

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
MCCABE, : 17-cv-00908-ERK-SJB
Plaintiff, :
: :
- versus - : U.S. Courthouse
: Brooklyn, New York
: :
LIFETIME ENTERTAINMENT :
SERVICES, LLC, : December 12, 2017
Defendant :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE SANKET J. BULSARA
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For the Plaintiff:

Todd C. Bank, Esq.
Law Office of Todd C. Bank
119-40 Union Turnpike
Fourth Flr.
Kew Gardens, NY 11415

For the Defendant:

Eric Joel Feder, Esq.
Sharon Lee Schneier, Esq.
Davis Wright Tremaine LLP
1251 Avenue Of The Americas
21st Floor
New York, NY 10020

Transcription Service:

Transcriptions Plus II, Inc.

61 Beatrice Avenue
West Islip, New York 11795
laferrara44@gmail.com

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1 THE COURT: So we're here for a Motion Hearing
2 and Argument in 17-cv-908, McCabe v. Lifetime
3 Entertainment.

4 Could the parties state their names for the
5 record please?

6 MR. BANK: Good afternoon.

7 Todd Bank for the plaintiff, Kevin McCabe.

8 THE COURT: Good afternoon, Mr. Bank.

9 MR. FEDER: Good afternoon, your Honor.

10 Eric Feder from Davis Wright Tremaine for the
11 defendant, with my colleague, Sharon Schneier.

12 THE COURT: Good afternoon to you both.

13 So we're here for an oral argument. The
14 defendants have moved to dismiss. They've also moved for
15 Rule 11 sanctions. There is a cross-motion for Rule 11
16 sanctions. We'll start with -- because it's defendant's
17 motion, you know -- the way I will propose to go is the
18 motion to dismiss first, then let Mr. Bank go on the
19 motion to dismiss and then we can turn to the sanctions
20 motions, so that we don't have to meld the issues if that
21 works with everyone.

22 MR. BANK: That should be fine.

23 MR. FEDER: That makes sense, your Honor.

24 THE COURT: So you can use the podium if you
25 would like.

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1 MR. FEDER: I don't need to use the podium but
2 I guess I want to be closer enough to the paper, do you
3 mind if I sit or --

4 THE COURT: No, that's totally fine.

5 MR. FEDER: Okay. Thank you, your Honor.

6 This case is a putative class action under the
7 Telephone Consumer Protection Act over a twenty-second
8 phone call that the plaintiff claims to have received and
9 that call was placed in August of 2009, so over eight
10 years ago, sitting here today.

11 It fails as a putative class action for two
12 separate reasons. The first is that the case must be
13 dismissed in its entirety as time barred under binding
14 Second Circuit law and the second is that even if Mr.
15 McCabe's individual claim were not time-barred and again
16 it is, the class complaint is time barred.

17 THE COURT: And so let me -- one thing in your
18 papers that I didn't see you distinguish between is, or
19 maybe you didn't and I'll phase it this way, there's
20 obviously the individual claim of Mr. McCabe and there's
21 the treatment of any class claim.

22 I take it your argument is Mr. McCabe's claim
23 is time barred because the statute of limitations was not
24 tolled after Judge Hellerstein's decision denying class
25 cert in Leyse I, and therefore, Mr. McCabe's individual

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1 claim is time barred under Giovaniello, is that right?

2 MR. FEDER: That's exactly right, your Honor.

3 THE COURT: Now how do I -- now is that true
4 for -- and I'll ask Mr. McCabe the same question -- I
5 mean, Mr. Bank the same question, is that true for every
6 other member of the class?

7 MR. FEDER: Certainly. Under Giovaniello,
8 American Pipe tolling, when exists at all, exists until
9 the district court denies class status in the original
10 case that effectuated the tolling in the first instance.
11 So the tolling would apply when it's in effect for any
12 putative class member, absent or otherwise, and when the
13 tolling ends, it likewise ends for everyone across the
14 board.

15 So whether it's Mr. McCabe or some other member
16 of the class and whether they bring it as a putative
17 class action again or as an individual claim or even a
18 motion to intervene, as was the case in the original
19 American Pipe case --

20 THE COURT: So here's -- so that makes sense
21 if, I assume every member of the class is someone who
22 received a phone call on August 19th or 20th, because the
23 way the class is defined is anyone who received a phone
24 call from Lifetime on August 19th or 20th to the present,
25 and so while Mr. -- your argument makes sense or if I buy

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1 that Giovanniello applies as you say it does for Mr.
2 McCabe, but why does it necessarily apply to every other
3 member of the class if the class is defined in a way that
4 anyone received a phone call and all I have with me is
5 the complaint with the class allegation.

6 MR. FEDER: It's a fair question, your Honor.
7 First of all, as a point of fact, there's no -- there
8 were no other phone calls at issue here, so we aren't --
9 as a practical matter, talking about phone calls that
10 took place in 2012 or 2013 or anything. The only phone
11 calls that are really the subject of this claim at all
12 are the phone calls that were in August 2009. So as a
13 practical matter, that's the case.

14 THE COURT: And so, I would like to pause on
15 that for a second before you get to your next point. I
16 have these same questions for Mr. Bank. Right. As a
17 practical matter, right, now the Second Circuit has said
18 how I have to evaluate a motion to dismiss when there's a
19 statute of limitations argument, right? It either has to
20 be on the face of the complaint or from any publicly
21 filed document or opinion.

22 Now how am I to determine for the purposes of
23 your 12(b)(6) motion that every other -- that there is
24 no, as a practical matter, phone call that occurs at any
25 other time, given the way the class is defined?

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1 MR. FEDER: And I want to look at the class
2 definition again while we're talking but the class is
3 defined and the claim is based on this particular phone
4 call that was made in connection with the switcher
5 channels for Lifetime. That's the substantive claim.

6 And so in order to be a part of that class, and
7 indeed, in order to benefit from the tolling in the first
8 place, they would have to be a part of the class as --
9 you know, part of the putative class that was asserted in
10 Leasing I, otherwise the tolling --

11 THE COURT: Well, right, but if I define the
12 class that says anyone who got phone call on April 19th
13 or 20th to the present, the present being the date I
14 filed the complaint, then there's no, you know -- what
15 applies to the named plaintiff doesn't necessarily apply
16 to everyone, it may be that -- what's the date of the
17 Leyse I complaint?

18 MR. FEDER: August 16th, 2013.

19 THE COURT: So four days before the limitations
20 period --

21 MR. FEDER: Correct.

22 THE COURT: -- expires. You know, bracket
23 whether I can consider this on a motion but what was the
24 discovery in Leyse I about the class and whether it did,
25 in fact, involve anyone outside of -- anyone receiving a

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1 phone call on August 19th or 20th?

2 MR. FEDER: So I was not involved in that. My
3 colleague, Ms. Schneier was, so I think it makes sense to
4 have her speak to that directly.

5 THE COURT: That's totally fine, yes.

6 MR. FEDER: However, one thing to pause is the
7 claim -- a class action claim has to at least survive as
8 a claim on behalf of the named plaintiff and there's no
9 question in our view, that under Giovanniello, Mr.
10 McCabe's claim which is based on having received a phone
11 call in August 2009 and based on the exact same
12 definition and class that was asserted in Leyse I, that
13 Mr. McCabe's claim is time barred.

14 THE COURT: Right, but that's not satisfactory
15 for you or your client, I assume because then we end up
16 in this kind of, you know, going round and round where
17 maybe Mr. Bank finds somebody else says --

18 MR. FEDER: It --

19 THE COURT: -- and it's a without prejudice
20 dismissal, as opposed to a with prejudice dismissal --

21 MR. FEDER: Sure, but --

22 THE COURT: -- which is not what you've asked
23 for.

24 MR. FEDER: Understood. If Mr. Bank finds
25 someone who received a phone call in August 2017, we

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1 obviously aren't going to come here and say that that
2 claim is time barred.

3 That's why I say partially as a practical
4 matter, the reality is there are only these calls in
5 August 2009 but either way, that wouldn't save Mr.
6 McCabe's claim and once Mr. McCabe's claim is dismissed,
7 the class claim is dismissed too. You can't have a
8 floating theoretical class action with no named plaintiff
9 notwithstanding or viable claim.

10 THE COURT: Well, it's what happens in lots of
11 cases, right, where there's a defect with the named
12 plaintiff and there's a substitution. And I guess that's
13 why you make your Corwik, right, which is that the class
14 is barred because you're relitigating the entire class
15 again and you need the Corwik part to bar the entirety of
16 the class action. That's why you make that argument. Is
17 that right?

18 MR. FEDER: Well, I would say again that we
19 don't need the Corwik argument in that sense because Mr.
20 McCabe's complaint, and therefore, the whole complaint,
21 would have to get dismissed, notwithstanding that there
22 can be substitution of the plaintiffs.

23 THE COURT: But then it would be a without
24 prejudice dismissal as opposed to a with prejudice
25 dismissal. Well, it would be with prejudice as to Mr.

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1 McCabe, I assume.

2 THE COURT: Certainly, right, but not to the
3 class.

4 MR. FEDER: Right. Well, except that anyone
5 else who came forward unless they could show a non-time
6 barred claim would be in the exact same boat as Mr.
7 McCabe. If anyone coming forward and saying I received a
8 call in August 2009, is certainly in the same shoes as
9 Mr. McCabe and frankly, Mr. Leyse but second --

10 THE COURT: Right, I don't disagree with you on
11 that. I mean, if your point is that there is no other
12 individual representative who could ever arise, right,
13 and therefore the class itself is inherently defective
14 and therefore the class allegations ought to be dismissed
15 with prejudice, that's an determination you can make from
16 either the face of Judge Hellerstein's decision or the
17 complaint or some other judicial document, that makes
18 sense to me but I am trying to say well, how can I --
19 what can I do to make that determination? I could make
20 it as a legal matter, based on Corwik but --

21 MR. FEDER: Right.

22 THE COURT: -- as a factual matter.

23 MR. FEDER: Well, so I think it makes sense. I
24 am happy to proceed to discuss Corwik, although I don't
25 know if it make sense to have Ms. Schneier speak to the

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1 discovery that took place in Leyse I, first.

2 THE COURT: Go ahead.

3 MS. SCHNEIER: Okay. So thank you, your Honor.

4 A couple of points. When Mr. Leyse moved for class
5 certification, the class that he proposed was all persons
6 to whose residential telephone lines defendant Lifetime
7 Entertainment or third-party acting on its behalf
8 initiated in August 2009.

9 THE COURT: In other words, the initiation is
10 the operative word and if anyone had initiated --

11 MS. SCHNEIER: But it's in August of 2009.

12 THE COURT: Right.

13 MS. SCHNEIER: Right.

14 THE COURT: Okay. So if it's initiated in
15 August 2008 -- '09, everyone is time barred in the class.

16
17 MS. SCHNEIER: Yeah, that was the class and I
18 going back to the original Leyse complaint, it had that
19 same -- during the period from August 16th, 2009 to the
20 present, language so --

21 THE COURT: Well, that's the part that -- to
22 the present --

23 MS. SCHNEIER: Right.

24 THE COURT: -- right, is --

25 MS. SCHNEIER: But that just shows that he then

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1 took the McCabe complaint, right -- he took the Leyse
2 complaint, copied into the McCabe complaint. The
3 evidence in discovery as reflected in his class
4 definition and Leyse, was that there were, you know,
5 allegedly two days when calls were initiated, August 19th
6 and August 20th of 2009. There was extensive discovery,
7 you know, about whether Lifetime had ever initiated any
8 other calls. There are no other calls. Both Leyse I,
9 Leyse II and this McCabe action are all notwithstanding
10 that the subsequent complaints mirror the language in
11 paragraph 1 of Leyse I, that to the present is, you know,
12 just I guess superfluous or legal jargon that is added --

13 THE COURT: But the --

14 MS. SCHNEIER: -- that there is no other --

15 THE COURT: But the word initiation --initiated
16 is what makes it clear that it would have to have been a
17 call for anyone because -- and I'll ask certainly Mr.
18 Bank this, but it's not a call that was initiated in
19 August of 2009, which was received five years later.

20 MR. FEDER: No.

21 MS. SCHNEIER: No. And I think the discovery
22 was pretty clear, you know, on that and I haven't seen
23 in --

24 THE COURT: And I guess the point here is not
25 that the discovery wasn't clear or not but, right, we're

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1 here on a 12(b)(6) trying to make a with prejudice
2 determination with respect to every other member of the
3 class and, you know, there are certain things I can rely
4 on. There are certain things I cannot rely on.

5 MR. FEDER: Fair enough, your Honor. And I
6 think the Corwik argument does accomplish this sort of --
7 the pure legal question of with prejudice, as to the
8 class as a whole because that bars the subsequent class
9 action.

10 But again, as a practical matter --

11 THE COURT: But on Corwik, why is that not in
12 suspension now because the question I posed on the docket
13 yesterday, the Supreme Court's cert grant?

14 MR. FEDER: I -- so it is the Supreme Court is
15 granting a cert in China and in fact, certainly shows
16 that it's a life issue. For one thing at the moment,
17 Corwik remains the law of the Second Circuit and the
18 Ninth Circuit was relying on the Smith v. Bayer and Shady
19 Grove cases in the Supreme Court to reach a different
20 conclusion as to whether or not there's a bar in the
21 subsequent class action.

22 District Courts within the Second Circuit have
23 continued to apply Corwik since Shady Grove, since Smith
24 and there's no indication in the Second Circuit that
25 Corwik has been abrogated.

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1 THE COURT: But let's pay that out for a
2 second, right? Let's say the Supreme Court comes out the
3 other way. This case -- and I rely on Corwik and the
4 district judge -- Judge Korman accepts my reliance on
5 Corwik, this case would have to exhaust all appeals for
6 it to become immune from the Supreme Court's China
7 Agrotech decision because this case would still be on
8 direct appeal while the Supreme Court's case is pending
9 on, you know --

10 MR. FEDER: Sure.

11 THE COURT: And so it's I could rely on it but
12 it seems odd to do that.

13 MR. FEDER: Understood. And I mean, we would
14 submit first of all that although you can never read too
15 much into the granting of cert that if I were a betting
16 man, I would say the Supreme Court was going to come out
17 more likely in favor of Corwik but obviously we can't use
18 that as a basis to decide anything here.

19 I think that's why in some ways, I would return
20 to the original argument which is that the claim -- the
21 complaint before the Court now is brought by Mr. McCabe
22 individually and on behalf of others similarly situated
23 and his claim is time barred.

24 So his complaint must be dismissed and at that
25 point, if Mr. Bank wants to find a plaintiff with a non-

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1 time barred claim, that's sort of a separate issue.
2 Frankly, someone who received a phone call in August of
3 2014 wouldn't be bound in any way by what happened in
4 Leyse I. They wouldn't even need to be taking advantage
5 of the American Pipe tolling from Leyse I. It would just
6 be a different case.

7 The case before the Court here is identical in
8 substance and, in fact, almost to the word in wording to
9 the complaint in Leyse I, and as well as Leyse II. And
10 the claims in all of those cases sitting here today and
11 ever since September 2015, is time barred.

12 THE COURT: So let me -- you don't argue
13 collateral estoppel. I presume because of the Supreme
14 Court Smith decision.

15 MR. FEDER: Right.

16 THE COURT: But play this out for me. Assume
17 the class is not dismissed and a class is ascertained by
18 a district judge here, is that possible in light of the
19 Second Circuit's affirmance in Leyse I? In other words,
20 you know, Justice Kagan's in Smith talks about how, you
21 know, collateral estoppel doesn't apply to class actions
22 but there are perhaps principles of comity or law of the
23 circuit doctrine to bar a class action.

24 And it seems very odd to me that you don't
25 argue and it, you know -- and maybe there a reason why

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1 but why is -- whatever -- why is the question of
2 ascertainability not fully decided about this class by
3 the Second Circuit's decision in Leyse I or Leyse I?

4 MR. FEDER: well, we would say -- I'm going to
5 say two things. One, it is and if and when -- well, if
6 the complaint were to survive dismissal because it were
7 not time barred and there were any plaintiff with a claim
8 that was not time barred, and moved for class
9 certification, you can certainly bet that we would be
10 raising all of those arguments to oppose class
11 certification.

12 THE COURT: Okay.

13 MR. FEDER: To be sure, the question of
14 "ascertainability" is a bit in flux. We have a cert
15 petition pending in Leyse I on that question. The
16 Supreme Court has been getting cert petitions on that
17 question. It's unclear where that will shake our
18 precisely.

19 THE COURT: It's not your cert petition, it's
20 Mr. Bank's cert petition.

21 MR. FEDER: Correct, correct.

22 THE COURT: For the January 18th --

23 MR. FEDER: We have opposed the cert petition
24 in Leyse I that's filed by the plaintiff. but we would
25 certainly argue that the decision in Leyse I is in the

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1 first place, preclusive and in the second place, highly
2 persuasive as to why any subsequent claim -- subsequent
3 class couldn't be certified as a side note and granting
4 that Corwik is a bit in flux now because of China
5 Agrotech.

6 That's exactly the policy behind Corwik which
7 is that once you have a class determination in a case,
8 you can't just keep trying with a different judge who
9 might say well, I am going to roll up my sleeves and --

10 THE COURT: See, that's what I would think but
11 I don't think that's right. Corwik is not an estoppel
12 decision. It's not a preclusion decision. That's why
13 Smith can exist as a separate case.

14 MR. FEDER: Yeah.

15 THE COURT: And the line of cases on Corwik can
16 exist in parallel because Corwik is a species of American
17 Pipe tolling for the class basically and it says look,
18 the class doesn't get to be tolled while the individual
19 claims do get to be tolled and --

20 But you can imagine situation where there's a
21 class that escapes the Corwik rule because the statute of
22 limitations say is ten or 20 years long, right? It's not
23 an issue of preclusion rule.

24 MR. FEDER: No. You're absolutely right, your
25 Honor. It's an interesting hybrid of sort of preclusion

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1 values overlaid the equitable -- overlaid on the
2 equitable principles that underlie American Pipe tolling
3 and I think that's an important point. In the cert
4 petition, they discuss this, that there was a decision
5 from this past summer from the Supreme Court in CalPERS
6 v. ANZ in which the Court held very squarely that
7 American Pipe tolling is a form of equitable tolling. I
8 can get the cite for that -- that it's a form of
9 equitable tolling though.

10 And in that case, the Court held therefore,
11 that American Pipe tolling didn't override a statute of
12 repose, even as it could potentially override a statute
13 of limitations.

14 So it's important in general when you're
15 talking about American Pipe tolling to keep in mind that
16 it is not some rule-based or statutory sacrosanct
17 requirement. It is an equitable compromise that was
18 reached by the Supreme Court and has been applied since
19 then.

20 And so, Corwik is again, sort of incorporating
21 the estoppel principles and the policy behind estoppel
22 with the compromises that were being reached with
23 American Pipe tolling in the first place.

24 THE COURT: And look, Mr. Bank has been very
25 patient, so I want to turn to him but answer me this. If

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1 Corwik is on the shelf for now, the only way to forever
2 bar the class claims is to conclude that Mr. McCabe sits
3 in the spot as Mr. Leyse who sits in the same spot as any
4 other member of the class and every member, individual
5 claim is barred and therefore, there can never be a
6 proper class representative. Therefore the class claim
7 is barred.

8 MR. FEDER: We would agree with that, your
9 Honor, insofar as the actual class here is based on
10 people who received this phone call in 2009 but that --

11 THE COURT: Okay.

12 MR. FEDER: And that Mr. McCabe sits in those
13 shoes, Mr. Leyse sat in those shoes and anyone else who
14 sat in those shoes, is now eight years after the phone
15 call, would at best be able to take advantage of American
16 Pipe tolling as a result of Leyse I and at that point --
17 and that that tolling period ended in September 2015.

18 Someone who received a phone call about a
19 totally different program, totally different claim in --

20 THE COURT: Well, of course, but I --

21 MR. FEDER: -- you know, August 2011. Their
22 claim would be time barred now both because it's years
23 later and because it wouldn't have been tolled by Leyse
24 which as a class action was only ever pertaining to the
25 August 2009 calls.

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1 THE COURT: Okay. Mr. Bank?

2 MR. BANK: I'm not sure if I would agree with
3 that last point, but just being practical, discovery in
4 -- I'll just refer to it as the Leyse litigation, did
5 show that all of the calls were made in August of 2009.
6 The complaint is worded more broadly because discovery
7 could show more and technically it says until the
8 present, so discovery could show more. But yes, those
9 are the phone calls.

10 THE COURT: And discovery did not show more.

11 MR. BANK: In Leyse, correct.

12 THE COURT: And --

13 MR. BANK: That is correct.

14 THE COURT: -- do you have any reason to
15 believe discovery would show more today?

16 MR. BANK: No specific reason, no.

17 THE COURT: Okay.

18 MR. BANK: No, we don't. And so the
19 hypotheticals that we discussed with telephone calls made
20 more recently, I don't -- I have no specific reason to
21 believe those hypotheticals would ever bear fruit.

22 THE COURT: And so for you then, if that's
23 true, the only way Mr. McCabe's claim is timely or any
24 other class member's claim is timely, is if the
25 Giovanniello rule doesn't apply. Isn't that right?

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1 MR. BANK: I don't know if I would say does it
2 -- in these sense that you're asking it, your Honor, I
3 would say yes. Again, I've distinguished Giovanniello in
4 the papers but again, in the sense that I believe you're
5 asking the question, the answer would be yes.

6 THE COURT: Well, in other words, I'll ask the
7 question without a reference to a case name, right? The
8 only way Mr. McCabe's case is timely, is if tolling is
9 imposed after Judge Hellerstein's decision in September
10 of 2015?

11 MR. BANK: Yes, that's absolutely correct.

12 THE COURT: Okay. And that's true for every
13 other member of the class.

14 MR. BANK: Assuming as I did state, that the
15 class members, if not as specifically defined in the
16 complaint, but let's say in reality, as you will, are
17 limited to those who received calls in August of 2009,
18 then the answer would be yes.

19 THE COURT: And that's the way you define it in
20 the complaint.

21 MR. BANK: The complaint is more broad because
22 it refers to calls made from August of '09 through the
23 present but again, discovery in the Leyse litigation only
24 revealed calls in August of 2009 and as I stated, we
25 don't have any specific reason to expect that that would

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1 change here.

2 THE COURT: And that's because even for Mr.
3 McCabe, right, his call is a call that he received
4 ostensibly in August of 2009.

5 MR. BANK: Correct.

6 THE COURT: Okay. So you have to have tolling
7 after Judge Hellerstein's decision and on one basis do
8 you think that's possible?

9 MR. BANK: Well, I will start by saying if I
10 may just give a brief background of American Pipe tolling
11 and more importantly, it's rationale which I think
12 applies here. The first thing is that without any
13 American Pipe tolling, putative class members whose
14 individual claims would become time barred before an
15 initial decision on class certification, like Judge
16 Hellerstein's decision. They face a dilemma. Either
17 they can take a risk that class certification will be
18 denied in which case they lose all their rights or they
19 can bring their own actions or motions to intervene in
20 order to protect against the risk that class
21 certification will be denied. That's why the Courts
22 calls these actions, either protective or duplicative
23 actions. They're not really meant necessarily to
24 litigate but to provide insurance in case class
25 certification is denied.

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1 Now by making it unnecessary via American Pipe
2 tolling to bring protective actions, American Pipe
3 tolling also serves the interest of the judicial system
4 because otherwise, the Courts would have to preside over
5 all of these cases, only for their own part -- for the
6 Court's own part, that is, to take the risk that in the
7 event that certification were granted, all of these so-
8 called protective actions will have been for nothing. It
9 will just cost people time and money and same with the
10 judiciary.

11 THE COURT: And you could keep going. All of
12 this makes sense to me but that's why we have the
13 American Pipe rule. It doesn't explain to me why you
14 would have tolling after the class cert is denied.

15 MR. BANK: That's what I am going to get to,
16 Judge --

17 THE COURT: Okay, go ahead.

18 MR. BANK: -- if I may? And then just before I
19 do though, the other rationale of American Pipe tolling
20 is that once the initial class action is brought, the
21 defendant has now been put on notice of the potential
22 claims against it, the number of potential class members
23 and also the need to preserve evidence to deal with those
24 claims.

25 Well, so I've discussed three rationales for

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1 tolling. All of those rationales apply and continue to
2 apply I should say, when there's an appeal of a class
3 certification denial. So let's for example, at the
4 outset of a case, it's unknown whether certification will
5 be granted.

6 THE COURT: But Mr. Bank, here's the issue,
7 right? The legal world is not just determined by
8 rationales. It's determined by legal principles and
9 these arguments may have had some force, some
10 persuasiveness, some utility before Giovannielo came out
11 but the Second Circuit ruled on this point and said class
12 -- American Pipe tolling ends when class cert is denied
13 for whatever reason.

14 MR. BANK: Well, that's what I wanted to
15 address Giovannielo and I think we did very candidly in
16 the briefs but I will summaries here if I may.
17 Giovannielo dealt with a different situation than in the
18 Leyse case. It did not deal with a Rule 23 denial of
19 certification.

20 In Giovannielo, the Court dealt with a prior
21 action as these cases normally do, prior actions, in which
22 the Court held that a New York statute prohibited a class
23 from being certified all together. In other words, you
24 don't even get to a Rule 23 analysis. The class is just
25 not eligible for certification.

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1 So if tolling were to continue in Giovanniello
2 through class --

3 THE COURT: Where in the opinion is anything
4 like you're saying limit the case in that way.

5 MR. BANK: As we state in the papers,
6 Giovanniello did not focus on the distinction that I just
7 drew and we were very candid about that.

8 THE COURT: And so on what basis are you saying
9 that the Second Circuit's rule which as far as I can
10 tell, is crystal clear that there is no American Pipe
11 tolling after a denial of class certification, where does
12 it give you any room to make the argument you're now
13 making?

14 MR. BANK: The way the Court expressed its
15 opinion, as we discussed at length in the papers, did not
16 provide that room.

17 THE COURT: And --

18 MR. BANK: However --

19 THE COURT: So then how are we to rule for you?

20 MR. BANK: I'll explain and I am not making any
21 prediction, of course, your Honor, but I will explain.
22 The general rule as to whether a case from another --
23 from a higher level court as in the Second Circuit, of
24 course, the question of whether such an opinion is
25 binding is based on whether the differences in facts

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1 between the potential binding case and this case here,
2 are material or if those differences constitute
3 irrelevant factual distinctions.

4 So as we stated in the papers, Giovanniello did
5 not give -- we were very candid about this, Giovannielo
6 gave no indication to believe that had the facts in
7 Giovannielo been exactly as the fact are here, that the
8 Court would have ruled in a different way. We've never
9 suggested that.

10 THE COURT: So you concede that Giovannielo,
11 as written, bars American Pipe tolling after a denial of
12 class certification?

13 MR. BANK: In the sense that Giovannielo did
14 not focus on the traditional situation like the current
15 one, but the question as to whether Giovannielo is more
16 than persuasive and is binding, I think is different
17 because again, any judicial opinion has to be looked at
18 in light of the facts that produced it.

19 So the question -- let's say just for the sake
20 of discussion only, that this Court just for argument's
21 sake, disagree with the reasoning of Giovannielo, okay?
22 And the Court were inclined -- or say I wish Giovannielo
23 weren't binding because --

24 THE COURT: And what law school teaches that I
25 or any district judge is able to ignore the instructions

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1 of the Second Circuit?

2 MR. BANK: Because the instructions have to be
3 considered in their factual context. What was at issue
4 in Giovanniello was a certain set of facts. What is at
5 issue in this case are not the same facts. So --

6 THE COURT: And what court has limited either
7 the Second Circuit or District Court has limited
8 Giovanniello in any way that you describe?

9 MR. BANK: I know I discuss in, at least one of
10 the many briefs we've done, your Honor, that there was
11 a --

12 THE COURT: Here's the --

13 MR. BANK: -- I would have to look for it in
14 the briefs but --

15 THE COURT: -- here is the difficulty I am
16 having --

17 MR. BANK: Yeah.

18 THE COURT: -- to be perfectly frank --

19 MR. BANK: Sure.

20 THE COURT: -- in bluntness, okay? You argued
21 all of these points. You are counsel of record in
22 Giovanniello.

23 MR. BANK: Right.

24 THE COURT: You argued each of these points as
25 to why American Pipe tolling should extend beyond the

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1 denial of class certification. They were squarely
2 rejected in a decision that gives no room for maneuvering
3 and yet you're trying to reargue those points to the
4 district court.

5 MR. BANK: Well, we're -- I understand your
6 point, your Honor, I do. What we said in the briefs and
7 what I will reiterate from the briefs here is that again,
8 as I said in my scenario, assuming for the sake of
9 discussion, your Honor or the district court disagree
10 with Giovanniello. The question then would be is
11 Giovanniello binding on this Court, such that that
12 disagreement would be irrelevant.

13 And the way to answer that question is not -- I
14 don't -- not to predict well, what would the Second
15 Circuit have done in this factual scenario? We've
16 conceded that Giovanniello gave no reason to think it
17 would do something different.

18 But as to whether Giovanniello is binding, that
19 depends on what the facts were that produced that
20 decision. If the Court found that there were no material
21 difference, it would be binding.

22 THE COURT: Mr. Bank, what case says you
23 interpret precedent in that way?

24 MR. BANK: There's --

25 THE COURT: What case? And it hasn't -- it

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1 could be something entirely out of the securities
2 context, as far as I care. That's not how the law
3 operates. It simply is not the case that you can say
4 well, here is a rule o decision that exists on what a
5 word means, a term means, and we get to ignore it because
6 we can somehow distinguish the facts in our case and have
7 it not apply.

8 Now if the rule of decision has some limitation
9 on it, if it has some cautionary language in front of it,
10 if it has room, maybe you can make that argument but
11 you're still not able to point to me anything in the
12 decision by page cite or anything else that even allows
13 for that kind of argument.

14 MR. BANK: Again, as we stated in the briefs,
15 Giovanniello did not in its explanation as to how it
16 reached or why it reached its holding. Giovanniello did
17 not provide any indication that it would have ruled
18 differently in the present case. We're not claiming that
19 the --

20 THE COURT: So then how can you make this
21 argument?

22 MR. BANK: Because again, your Honor, here --
23 if you look at the facts -- one looks at the facts you
24 might say, one looks at the facts in Giovanniello, one
25 compares that to the holding of the Court, okay? Not

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1 necessarily the reasoning or the explanation that led to
2 the holding, the facts and the holding. Then the Court
3 looks at the facts in this case and the Court says, are
4 those facts materially the same as in Giovanniello?
5 Again, obviously every -- the facts of every case are
6 different.

7 Obviously, we're not saying that oh, well,
8 Giovanniello was an FTCPA case and this is a TCPA case,
9 well if that's the only difference, that would not be a
10 material difference for purposes of the legal issues.

11 The question though before the Court -- again,
12 assuming the Court were inclined not to find
13 Giovanniello, just for the sake of discussion, the
14 question before the Court would be here are the facts in
15 Giovanniello which again dealt with a dismissal of the
16 entire case, not a denial of certification and so on, and
17 we explained that in the briefs.

18 Then we look at the facts here and we say, all
19 right, what happened in this case here? There was a Rule
20 23 class certification denial and so on.

21 If in the Court's view, those facts are not
22 materially different, then yes, the Court would and
23 should find that Giovanniello is binding. We said that
24 in the briefs. If the Court were to say -- again,
25 leaving aside the explanation that Giovanniello provided,

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1 if the Court were to say well, you know, just because
2 tolling ended or tolling didn't continue after the
3 dismissal of a case, based on something that had nothing
4 to do with Rule 23 criteria but rather something
5 preliminary to that, does that necessarily mean that that
6 same reasoning or that same holding, I should say, would
7 apply to a case where unlike a complete dismissal which
8 would have had then to await remand if reversed, and
9 certification, a much longer time period of tolling, do
10 the facts in this case materially correspond with the
11 facts in that case? And again, that's -- we've addressed
12 that in the papers and if your Honor --

13 THE COURT: But you keep saying you addressed
14 that in the papers but what is the material difference?

15 MR. BANK: The difference is that the tolling
16 period -- yeah, here's the exact difference, the tolling
17 -- if American Pipe tolling had continued in the prior
18 action that Giovanniello had been addressing, that
19 tolling period would have been (a) considerably longer
20 than the tolling period we're talking about here, and (b)
21 there would have at least from a statistical
22 perspective --

23 THE COURT: That's not an argument as to why
24 the facts in this case are different from the facts in
25 Giovanniello such that the rule of decision announced by

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1 the Second Circuit has no applicability here. That's
2 just an argument that okay, if you extend tolling, my
3 case survives.

4 MR. BANK: But what we're saying is that in
5 Giovanniello -- again, the prior action at issue there --

6 THE COURT: Right.

7 MR. BANK: -- in that action, the Court found
8 that class certification could not even be addressed
9 based on a New York statute which has since been
10 overturned but that's neither here nor there for now.

11 THE COURT: A class could not be certified in
12 other words.

13 MR. BANK: Right. It was not a Rule 23 denial.
14 There was not numerosity. It wasn't based on anything to
15 do with Rule 23. The Court said we don't even get to
16 Rule 23 analysis.

17 THE COURT: But why is that not an argument
18 that in this case, the rule applies with greater force,
19 as opposed to the opposite way around because here, you
20 have a situation where one court affirmed by that same
21 Court of Appeals has found that no class could possibly
22 be ascertainable.

23 So all you have before in Giovanniello is a
24 step before class certification that no class could ever
25 be certified because there's some legal bar to it,

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1 because there's some statutory prohibition. That's sort
2 of like saying if there were something in the TCPA that
3 said no class actions may be maintained under this
4 section.

5 MR. BANK: Because I am --

6 THE COURT: So all that you had here is that
7 you've crossed over whatever hurdle that may have existed
8 via statute, you got to Rule 23.

9 MR. BANK: Except that there's -- I see one
10 difference. And again, I am not saying the Court -- that
11 it's a black and white issue that there's no -- that the
12 facts in Giovaniello are so widely different than here,
13 that it's not binding or vice versa. And again, we were
14 very forthright in the briefs.

15 What I am saying is this. From the Court's
16 perspective, let's suppose the Court in Giovaniello were
17 thinking about should we extend tolling here through the
18 appellate process, then what they're faced with is the
19 following situation.

20 First, the dismissal of the entire action,
21 again which was all preliminary to a Rule 23 analysis
22 because we didn't get to that, Giovaniello --

23 THE COURT: But you still haven't answered the
24 question. It's preliminary to a Rule 23 analysis. Yours
25 came after a Rule 23 analysis. It's -- in the first

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1 situation where it's before Rule 23 analysis, right, the
2 rationale of American Pipe tolling, other class members
3 may not be aware of whether or not they need to stay in
4 reserve or go forward with their action and therefore,
5 you ought to continue tolling and not allow for
6 intervention.

7 If you set the rule that says well, look,
8 before you ever get to a Rule 23 decision, you're barred
9 because there's some statutory bar or some other bar and
10 there's no tolling after that period, it seems to me that
11 in this situation, where any preliminary bar, let's call
12 it, doesn't exist, there's no TCPA --

13 MR. BANK: Correct.

14 THE COURT: -- provision that says no class
15 actions can be maintained.

16 MR. BANK: Right.

17 THE COURT: You survive a 12(b)(6) motion for a
18 failure to state a claim that -- and you get to Rule 23.
19 So if I apply Giovanniello, I would say look, here it
20 applies with more force.

21 MR. BANK: I see the point but I am looking at
22 it from the number of steps and if I could just make the
23 argument but I will try to be brief, from Giovanniello
24 perspective, if -- again, regarding the prior action at
25 issue there, if tolling had continued here's what the

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1 perspective would be from the moment that the case is
2 dismissed.

3 Tolling would then be continued through the
4 appellate process of a dismissal of the case. Then if
5 that dismissal is reversed on appeal, the case is now
6 remanded back to the district court, only then might the
7 district court or presumably would the district court
8 address class certification, so we're talking a two-step
9 process rather than the one step. As in here, we appeal
10 the class certification denial and either there's an
11 affirmance or a reversal.

12 There was a case last -- since the briefs have
13 done, a Seventh Circuit case -- I have it somewhere in my
14 notes, but there was a Seventh Circuit case that was
15 decided. It's a published opinion on November 16th and
16 Seventh Circuit case law had said -- had held that
17 American Pipe tolling ends upon a Rule 23 class action
18 denial and does not continue through an appeal.

19 THE COURT: What's the case name?

20 MR. BANK: I can --

21 MR. FEDER: We have it.

22 THE COURT: You have it?

23 MR. FEDER: It's Collins v. Village of
24 Palatine.

25 THE COURT: Hold on. I need to see it.

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1 MR. BANK: Yes, that's it. It's a November
2 2017 case.

3 MS. SCHNEIER: We have the cite.

4 THE COURT: Yeah, sure.

5 MR. BANK: I have it also somewhere.

6 THE COURT: What's the cite?

7 MR. FEDER: 875 F.3d 839.

8 MR. BANK: That case dealt with the issue which
9 is similar to the --

10 THE COURT: Sorry, what was the last --

11 MR. BANK: I'm sorry.

12 THE COURT: 875 F.3d?

13 MR. FEDER: 839.

14 THE COURT: 839. Okay. 875 F.3d -- oh, here I
15 got it. Sorry. Collins v. Village of Palatine.

16 MR. FEDER: Now it's on there.

17 MR. BANK: Yes. And should I -- may I describe
18 it briefly or do you want to read it first, your Honor or
19 look at it first?

20 (Pause)

21 THE COURT: How does this case help you?

22 MR. BANK: It doesn't help us but I have drawn
23 attention to it just to show that at least there is an
24 argument to be made which was not accepted by that court,
25 that there's a difference between a dismissal of a case

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1 all together compared to or versus a Rule 23 class
2 certification denial.

3 Obviously, if the Court were to agree with the
4 Seventh Circuit in Collins, that would not help us.

5 THE COURT: But the point here is the -- okay,
6 there may be a difference between a dismissal and a Rule
7 23 dismissal but you had a Rule 23 dismissal and
8 Giovanniello dealt with a Rule 23 dismissal, although at
9 an earlier stage.

10 MR. BANK: That was the thing you know -- I
11 don't meant to argue it but that's the point, it was not.

12 THE COURT: No, but it wasn't just a -- it
13 wasn't a dismissal that said, okay, it was a class action
14 dismissal. It was that class actions cannot be
15 maintained under New York law. It wasn't that the kind
16 of -- it wasn't like it appears to be in this case, which
17 is a 12(b)(6) motion against the individual.

18 MR. BANK: Right. But as a result, it would
19 have been more steps needed to get back to class
20 certification. That's the point I have been trying to
21 make. With -- in this case, what would be needed to get
22 back to class certification?

23 THE COURT: And so why does that count for a
24 different rule?

25 MR. BANK: Because of the longer -- because the

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1 more steps mean more time and that's one of the issues
2 that American Pipe tolling decisions talk about.

3 THE COURT: Where's the citation for that
4 proposition, that the longer it takes for class
5 certification to be resolved, American Pipe tolling
6 should extend for that purpose?

7 MR. BANK: I can give one example offhand.
8 There's the case that we cited in the briefs, *In re*
9 Vivendi

which was a Southern District case, 2012, which
10 held that American Pipe tolling continued through the
11 Rule 26(f) interlocutory appeal process and the Court
12 specifically explained it -- this is pre-Giovanniello and
13 I am not predicting what that court would do now but just
14 by way of the example --

15 THE COURT: But look, here's the reality, Mr.
16 Bank. It's impossible to read Giovanniello the way you
17 say. There's not a single case that you can cite to me
18 that reads it the way you said.

19 What you're trying to do is argue that it's
20 wrongly decided.

21 MR. BANK: Well, that's only in terms of
22 preserving our rights. What we have argued, Judge --

23 THE COURT: And it's very hard for me to
24 understand why this is not a wholly sanctionable claim.

25 MR. BANK: What we've argued with respect to

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1 Giovanniello is not -- and we were very candid in the
2 briefs. We said Giovanniello would appear to have
3 reached the same result if the facts were as they are
4 here.

5 But again, the question is --

6 THE COURT: And if that's true, why does this
7 complaint survive Rule 11?

8 MR. BANK: Well, I will get to that in a
9 moment. I will. But again, we're talking about whether
10 it's binding authority, not persuasive -- it's obviously
11 persuasive, it's a Second Circuit opinion.

12 THE COURT: It's binding. It's the Second
13 Circuit opinion on when tolling stops under American
14 Pipe.

15 MR. BANK: And our position is --

16 THE COURT: It's not a question of whether a
17 Third Circuit opinion applies.

18 MR. BANK: Of course.

19 THE COURT: It's a Second Circuit opinion.

20 MR. BANK: Of course. Of course, your Honor,
21 but we're saying that because the fact -- we think the
22 factual differences were material. If the Court were to
23 find that -- and I quote the case law, "If the Court were
24 to find that the factual differences constitute
25 irrelevant factual distinctions," I think is the quote

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1 and that might well be the case here, in which event the
2 Court would find that Giovanniello was binding and if
3 that's the case, then I will now turn to the --

4 THE COURT: So in any case where one is faced
5 with the rule of decision that squarely covers the issue
6 at hand, are you saying Rule 11 provides you protection
7 to file complaints if you can identify factual
8 differences that you, the party, filing the complaint
9 believe are material?

10 MR. BANK: If they are -- my understanding from
11 the case law and we cover this in the briefs, is that if
12 the facts that were the basis or that led to the decision
13 in question are materially different -- again, obviously,
14 as relating to the legal issue, obviously a TCPA case is
15 materially different from a FTCPA case but that's not the
16 kind of differences we're talking about. And I've
17 explained our position.

18 THE COURT: What case suggests that that's a
19 material difference?

20 MR. BANK: That specifically? There's not much
21 case law.

22 THE COURT: There's none.

23 MR. BANK: Well, again we do discuss --

24 THE COURT: You keep saying going back to
25 briefs but I am asking you for any authority and you

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1 can't -- there's not a case, tell me that I am wrong,
2 there's not a case that draws the distinction between a
3 Rule 23 certification denial and the kind of denial that
4 you've just discussed which is also a type of class
5 certification denial.

6 MR. BANK: Well --

7 THE COURT: There's not a case that interprets
8 Giovanniello in the way you suggest and there's not a
9 case that suggests -- and there's not a reason why the
10 rule shouldn't apply with greater force in this case than
11 it did even in Giovanniello itself.

12 MR. BANK: Okay. And I understand the
13 difference. I see it as more the two-step process but I
14 understand the Court's view on that. But again, there
15 are a number of cases and I can take a look at my notes
16 because they have copy from the briefs.

17 THE COURT: Take as much time as you want.

18 MR. BANK: Okay. There are a number of cases
19 that have held that a dismissal of the -- there are a
20 number of cases that hold that a dismissal of an action,
21 that they're still tolling through the appeal. There are
22 a number of cases going back.

23 THE COURT: Right, those are --

24 MR. BANK: Let's assume --

25 THE COURT: Well, let me be clear, I've read

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1 those cases.

2 MR. BANK: Okay.

3 THE COURT: Those cases talk about one of two
4 different things. One is if the Court of Appeals
5 reverses the class certification denial, that means
6 you'll retroactively apply tolling through the appellate
7 period. That hasn't happened here.

8 MR. BANK: Right.

9 THE COURT: The only way it happens here is if
10 the Supreme Court on January 8th grants your cert in
11 Leyse I and then chooses to reverse you. Am I wrong
12 about that?

13 MR. BANK: As far as that goes, that's correct.

14 THE COURT: Okay. And then the other kinds of
15 cases talk about when you are faced with a class action
16 complaint and someone moves to dismiss the individual
17 claim and says oh, for example, under the TCPA, you can't
18 recover for phone calls of a certain kind of a plaintiff
19 who only certain people are covered by the TCPA or it
20 doesn't apply to this kind of transaction or occurrence.

21 In other words, it's not a class action motion
22 that leads to a dismissal, am I wrong about that?

23 MR. BANK: No, I understand that point. I do.
24 I wanted to just address --

25 THE COURT: So I guess I am looking for a case

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1 that could plausibly help you in any way here.

2 MR. BANK: Well, if I may take a minute?

3 THE COURT: Please, take as much time as you
4 want.

5 (Pause)

6 MR. BANK: Again, your Honor, if we're talking
7 about a case that specifically stated that whereas in a
8 traditional Rule 23 class certification denial, we would
9 not apply tolling through the appeal but that we would
10 apply or something like that, no.

11 THE COURT: I realize that case --

12 MR. BANK: There's only so much case law on
13 these issues.

14 THE COURT: But I am trying to find any case
15 that helps you in any way that is -- that either says --
16 it can say any one of the number of things -- the
17 following things, the distinction that you're drawing is
18 material, thus a -- period, full stop, from which you
19 could then infer that maybe a different tolling rule
20 ought to apply. I haven't seen that case.

21 Or another case that -- and we can go up the
22 chain that says Giovanniello should be limited in a
23 certain way which I take it you don't -- that you take it
24 you don't have.

25 In other words, something on which you could

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1 hang your hat to say look, the factual distinction which
2 I am now identifying has some weight, some material
3 effect to it, such that you could turn to a binding
4 precedence and say look, it shouldn't apply.

5 MR. BANK: There's a case that Lifetime relied
6 on, Kansas v. Fisher and Lifetime cited the case for
7 Betances' reference to the general rule laid out in
8 Corwik.

9 But in Betances the Court rejected the
10 defendant's reliance on Giovanniello because -- at least
11 the Court there said that --

12 THE COURT: What's the Betances cite?

13 MR. BANK: I have that in the brief. It's a
14 Southern District case of 2015.

15 THE COURT: Betances v. Fischer?

16 MR. BANK: Yes, that's it. Did you find it,
17 your Honor? Okay. Betances dealt with three prior
18 actions, all of them were dismissed on the basis of
19 qualified immunity. They were all brought as class
20 actions and so, having been dismissed, there could be no
21 class certification and the Court distinguished -- and
22 that's the one case I am specifically aware of, the Court
23 distinguished Giovanniello saying that whereas in
24 Giovanniello, the prior action dealt with sort of the
25 class issue, the prior actions at issue in Betances were

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1 more traditional dismissals.

2 Again, is that exactly on point? No, it really
3 isn't --

4 THE COURT: But --

5 MR. BANK: -- but --

6 THE COURT: -- that case says it refuses to
7 apply Giovanniello because Judge Sheindlin says, "No
8 court definitively denied class certification." That's
9 not true here.

10 MR. BANK: But in Leyse -- here, right. Okay.
11 I understand that.

12 THE COURT: No, no, I mean -- okay, in Leyse a
13 court definitively denied class certification.
14 Therefore, the Giovanniello rule would apply

15 MR. BANK: My point being thought there -- my
16 point is that there is a difference, at least from our
17 point of view, between a Rule 23 denial and some other
18 measure, be it a dismissal on the merits or like we've
19 been discussing, a rule as in the Giovanniello prior
20 action, that says you simply can't bring this as a class
21 action.

22 THE COURT: Right. And so I come back to my
23 original point, Giovanniello is a case in which they say
24 you can't bring this as a class action and it says you
25 can't toll after the denial. Here you have a situation

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1 where you've crossed that hurdle. No one has said you
2 can't bring this as a class action. You proceeded
3 through discovery.

4 Then you got to Rule 23 where class
5 certification was denied. The Giovanniello rule which is
6 like -- which says look, you shouldn't extend American
7 Pipe tolling past a denial where you can't even get the
8 hurdle, why should you be able to allow it when you've
9 crossed that hurdle and gotten to even Rule 23.

10 MR. BANK: I think again, Judge, I am not --
11 what we're saying is basically because of the two step
12 process, we were very straightforward in the briefs.
13 Giovanniello did not focus on the distinctions but again,
14 as to whether maybe just maybe being very technical, as
15 to whether it's binding authority, if the facts with
16 respect to the legal issue at hand, are materially
17 different, then it's not binding authority. And if the
18 facts --

19 THE COURT: So you would have it -- you would
20 only be binding authority if Junel (ph.) was a Rule 23
21 class denial?

22 MR. BANK: Or the equivalent which again we
23 don't think is the case here. By saying that, you simply
24 cannot even get to Rule 23 and that's with Shady Grove
25 drew that very distinction between saying you don't meet

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1 the criteria or you do of Rule 23 versus you don't even
2 get there in the first place. That was the very
3 distinction that the Supreme Court drew in Shady Grove.

4 THE COURT: But --

5 MR. BANK: It was not a tolling case to be sure
6 but my point is, there is a distinction as to whether the
7 Court --

8 THE COURT: But in this case, you were denied
9 class certification. You are here back litigating it.

10 MR. BANK: Well, you're referring to the Corwik
11 issue, your Honor?

12 THE COURT: Yes, the Corwik issue.

13 MR. BANK: Okay.

14 THE COURT: Do you agree it's on the shelf now,
15 given China Agrotech?

16 MR. BANK: Um.

17 THE COURT: In other words, it's not a basis to
18 dismiss the class claim?

19 MR. BANK: Yeah, I think that -- yes, I think
20 as far as the class claim, obviously, the Supreme Court
21 is going to be dealing with it.

22 As far as the issue as to whether McCabe's
23 individual claims are timely which again depends on the
24 length of tolling, that is not at issue in China
25 Agrotech.

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1 So again, being technical, that might not be a
2 basis for a stay of this case. However, speaking of
3 courts and explanations and reasoning and so forth
4 throughout this hearing today, the Court might consider
5 or we might request a stay because given the issues that
6 the Court will be addressing in China Agrotech, it's
7 entirely conceivable that the Court will address the
8 issue of how long tolling lasts. It's not the issue at
9 hand but as we all know in many Supreme Court decisions,
10 they give insight into related issues which is the case
11 here.

12 THE COURT: To quote Judge Pauley, "So that we
13 can continue the madness, you would seek a stay in this
14 case based on Corwic on an issue on which cert was not
15 granted?"

16 MR. BANK: What we were saying was that the
17 Court might consider -- we have not moved for a stay
18 obviously, it's just something that the Court --

19 THE COURT: I suggest that that would -- if
20 that's the basis, that would not be a wise motion to
21 make.

22 MR. BANK: I understand.

23 THE COURT: You can make whatever motion you
24 would like --

25 MR. BANK: I understand.

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1 THE COURT: Let me ask you this, why did you
2 file this case in this Court and not the Southern
3 District of New York?

4 MR. BANK: Because of McCabe's residence.

5 THE COURT: Well, that's now how the venue rule
6 works.

7 MR. BANK: He received a phone call here.

8 THE COURT: Is that the only basis? Why didn't
9 you file it in the Southern District of New York? You
10 could have.

11 MR. BANK: That's true, I believe, yes. But we
12 chose this venue because it was his residence and we
13 obviously could have chosen more than one venue but
14 that's what we chose.

15 THE COURT: And so assume you survive -- assume
16 for argument's sake you survive dismissal on a 12(b) (6)
17 motion, what would discovery in this case establish?

18 MR. BANK: I don't think there would be much,
19 if any, discovery. We would have to look at the
20 discovery from the Leyse litigation. I don't anticipate
21 there would be any discovery and if so, it would be
22 minimal.

23 THE COURT: It would --

24 MR. BANK: I don't know that there would be --
25 there would be very little.

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1 THE COURT: If you don't believe there would be
2 any discovery, is that -- sitting here today, can you
3 identify any discovery that you would propound if you
4 survived as 12(b)(6) motion?

5 MR. BANK: I am referring to fact discovery,
6 not expert discovery in terms of being able to get the
7 class certified. That will be different but in terms of
8 what phone calls were made, and the like, I don't
9 anticipate there would be much, if any, additional
10 discovery.

11 But I would like if I --

12 THE COURT: I guess the question is what's the
13 basis on which you could certify a class?

14 MR. BANK: Because what we would have -- that's
15 why I mentioned expert discovery and as the Second
16 Circuit -- two of the three judges on the Second Circuit
17 panel in Leyse gave, and we quote it in the briefs, gave
18 a very -- 1

19 THE COURT: In an oral argument, not in the
20 opinion.

21 MR. BANK: Well, the opinion wasn't -- that's
22 correct. The opinion was not inconsistent with that. It
23 simply said that we didn't educe enough evidence. It did
24 not say this class is inherently uncertifiable or
25 inherently deficient or defective. It simply said Leyse

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1 had not shown --

2 THE COURT: But you have no basis to believe
3 that you could get the list of phone numbers that
4 received this phone call, is that correct?

5 MR. BANK: That's correct. That's why the
6 judges mentioned sampling and other possible techniques
7 that would deal with that.

8 THE COURT: And there's no reason to believe --

9 MR. BANK: That's right.

10 THE COURT: -- that Judge Hellerstein was wrong
11 in saying that no one is going to remember a phone call
12 that lasted 20 seconds from 2009.

13 MR. BANK: Well, I don't know. The phone call
14 -- obviously not everybody would remember it, that's for
15 sure, but the phone call was from a very well-known
16 celebrity that unlike, for example, and I don't know your
17 personal experience of course, but not everyone is going
18 to remember if it's one of a thousand very typical robo
19 calls that unfortunately all too many people receive on a
20 regular basis, maybe not, but this was an unusual phone
21 call. It was from a known celebrity. I'm not aware of
22 thousands of celebrities leaving robo calls.

23 So yes, someone might remember --

24 THE COURT: Why aren't you just relitigating
25 the class certification issue that Judge Hellerstein

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1 denied and forum shopping it here?

2 MR. BANK: Well, wherever we brought the case,
3 the issue would be the same. Again, Corwik says, if I
4 may just pull it for a second.

5 THE COURT: Well, I guess put aside Corwik for
6 a second because we're putting it on the shelf and I
7 don't think Corwik is a preclusion case. It's a tolling
8 case.

9 You're trying to relitigate an issue another
10 judge in this Circuit decided with a different named
11 plaintiff in which the Second Circuit said was a basis to
12 find the class was unascertainable. Why would this
13 Court do anything differently?

14 MR. BANK: Well, because -- well, first off, I
15 don't know that it would but what I do --

16 THE COURT: Well, so how can you bring the
17 case?

18 MR. BANK: Well, I am explaining. What I
19 anticipate, your Honor, is very simple. Pursuant to the,
20 I'll say advice or a directive or what have you, or
21 suggestion of the two judges that we quote from the oral
22 argument, we would obviously look to coming up with a
23 much better method to deal with ascertainability.

24 Judge Hellerstein's decision never said that
25 this class could never be certified under any

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1 circumstance. Judge Hellerstein ruled and the Court of
2 Appeals recognized this --

3 THE COURT: Well, here's the point, right? You
4 had an opportunity to do discovery. There was an
5 extensive discovery conducted. There was a motion for
6 class certification made. Why do you get to restart that
7 here?

8 MR. BANK: The reason that Mr. McCabe has a
9 right to pursue his -- let me be more specific -- class
10 certification, assuming that his individual claim were
11 timely, of course, the reason is -- and again, it does go
12 back to Corwik, assuming that Corwik stands up before the
13 Supreme Court, it might or might not, but assuming that
14 the Ninth Circuit is reversed in the China Agrotech case
15 and Corwik remains the law in this Circuit, then the
16 question is whether there was -- whether the class was
17 found to be inherently uncertifiable.

18 THE COURT: What --

19 MR. BANK: So for example --

20 THE COURT: -- what case stands for that
21 proposition? Because you use that phrase --

22 MR. BANK: Sure.

23 THE COURT: -- a lot in your briefs --

24 MR. BANK: I will --

25 THE COURT: -- and --

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1 MR. BANK: Sure. Corwik used -- first I will
2 start with Corwik refer to "a definitive determination of
3 the inappropriateness" --

4 THE COURT: But we're not in the Corwik world.
5 I'm trying to figure out why you get to relitigate here.

6 MR. BANK: When you say here --

7 THE COURT: In the Eastern District of New York
8 or in the Southern District of New York --

9 MR. BANK: Okay.

10 THE COURT: -- or the Western District of New
11 York.

12 MR. BANK: Right, this is what I am trying to
13 understand. Okay.

14 THE COURT: An issue of class certification for
15 the exact same class --

16 MR. BANK: Well, because the case law is clear
17 as to when or somewhat clear, as to when a plaintiff may
18 and when a plaintiff may not do that.

19 THE COURT: And --

20 MR. BANK: And the Courts talk about -- like
21 for example in Kulig which again is in the briefs, K-U---
22 K-U-L-I-G, the Southern District 2014, said that in order
23 to be limited -- in order for American Pipe tolling to be
24 limited to an individual claim, as opposed to a class
25 claim, there must have been found to be in the prior

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1 action, a deficiency in the purported class itself. The
2 Eighth Circuit has said the same thing. So has the
3 Third, so has the Ninth.

4 And again, and now the issue before the Supreme
5 Court is whether even that standard remains applicable.

6 THE COURT: I think you're going in circles
7 here because I am not concerned about the tolling issue.
8 I'm concerned about why any court here isn't required to
9 follow Judge --

10 MR. BANK: Hellerstein.

11 THE COURT: No, the Second Circuit --

12 MR. BANK: No.

13 THE COURT: -- decision --

14 MR. BANK: Well, first it was a --

15 THE COURT: -- affirming Judge Hellerstein's
16 decision.

17 MR. BANK: Well, first it was a summary order
18 but are you talking bout preclusion principles?

19 THE COURT: Or comity or law of the Circuit
20 doctrine.

21 MR. BANK: Well it wouldn't be the law of the
22 Circuit because it was summary order.

23 THE COURT: Well --

24 MR. BANK: But again, the point is if we --

25 THE COURT: That's not how the appellate rule

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1 works but keep going.

2 MR. BANK: Okay. That's -- my understanding is
3 maybe different, okay. But my point is this, if we came
4 back -- let's say McCabe made the exact same proposal
5 based on that same evidence regarding
6 ascertainability --

7 THE COURT: Right.

8 MR. BANK: -- assuming that the law of
9 ascertainability has not changed. Then the Court,
10 although nothing would be binding as I see it, then the
11 Court certainly might invoke comity in that situation and
12 deny certification but that's the whole point. That
13 hasn't happened yet. We haven't --

14 THE COURT: Well, you just have swapped out one
15 name for the other and refiled the same complaint.

16 MR. BANK: Well, I understand but that's what
17 these cases all deal with is, yes, that's what all these
18 cases deal with --

19 THE COURT: Are these cases dealing with a
20 situation where there's something wrong with the
21 plaintiff, not the class. So maybe the plaintiff didn't
22 buy the stock or didn't get the phone call or evidence
23 has shown that they're a defective named plaintiff. And
24 you can refile with another class.

25 Here the class was found to be not

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1 ascertainable. Why do you get to file a successful
2 lawsuit?

3 MR. BANK: If the class had been found to be
4 nonascertainable for a reasons that would necessarily be
5 repeated in any future class certification motion, then
6 class certification -- again, I don't know if anything is
7 binding, but certainly there would be comity if not
8 something more, okay?

9 But again the case law, it tends to be in the
10 context of tolling, that's true. But again, the case law
11 is very clear that just because one -- I understand in
12 this case, I am counsel in both cases but I don't think
13 legally speaking that's relevant, as far as McCabe's
14 viewpoint. So let's just for the sake of discussion
15 only, and I understand I am the same counsel, leally I
16 don't think that has relevance.

17 But let's suppose McCabe looked at Leyse's
18 litigation and just for the sake of the argument say,
19 wow, what a poor job they did with certification. I will
20 find a lawyer who is going hopefully be able to do a much
21 better job and the lawyer meets with Mr. McCabe and he
22 says yes, I don't understand, why didn't Mr. Bank do
23 some sort of sampling or this or that. I will represent
24 you.

25 THE COURT: I can understand that if you didn't

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1 go through discovery and file class certification motion,
2 but you litigated an entire class with the person
3 standing in on behalf of the class. It's not like it was
4 -- and so this idea that it's inherently uncertifiable is
5 not an appealing distinction when you've litigated the
6 entire case but I get your point.

7 MR. BANK: Well again, that is the distinction
8 that the case law draw and again, if the indication -- if
9 I represented to the Court now that we think Judge
10 Hellerstein got it wrong and the Second Circuit got it
11 wrong and we intend to bring the exact same class
12 certification motion on the same basis, vis-a-vis
13 ascertainability, there would certainly be an issue of
14 comity, if not something else but that's not the case.

15 THE COURT: But so -- okay. I would like to --
16 go ahead.

17 MR. BANK: Oh, I am sorry, I think quite a
18 while ago, we talked about the issue of sanctions which I
19 may I address that briefly?

20 THE COURT: What I would like to do is I am
21 going to give you an opportunity but I want to hear from
22 them on the sanctions motion and then I will give you as
23 much time as you like.

24 MR. BANK: That's fine. Thank you, your Honor.

25 MR. FEDER: Thank you, your Honor. On the

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1 sanctions motion -- well, there's two sanctions motions,
2 ours and then a cross motion for sanctions and we think
3 that Mr. Bank or Mr. McCabe's motion can be denied out of
4 hand.

5 It's really just -- his reasons for sanctioning
6 us amount to disagreeing that his claim should be
7 dismissed and that disagreeing that he should be
8 sanctioned and the courts are very clear that that alone
9 isn't enough to make a sanction's motion.

10 The reasons for sanctions here are in line with
11 many of the issues your Honor raised just now in your
12 discussion. The federal rules, Rule 23 and American Pipe
13 tolling are not designed to allow a lawyer or a litigant
14 to basically through trial and error, relitigate the
15 exact same questions over and over again at the expense
16 of a defendant who has already litigated those questions
17 in good faith in one case.

18 And that's what happened here. We're not
19 asking for sanctions or recovery of costs in connection
20 with other case. We're not asking this Court to sanction
21 him for anything he did in Leyse II which was in the
22 Southern District but all of that provides obviously
23 context for why what happens here and why bringing this
24 case was so egregious.

25 As your Honor alluded to, Mr. Bank had multiple

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1 opportunities to make the arguments on class
2 certification in Leyse I. Not only was there the motion
3 for class certification, there was a motion for
4 reconsideration. There was a 23(f) petition. There was
5 the appeal and there was the oral argument of the appeal.

6 And at each stage he somewhat varied his
7 proposed approach for how he could get around the
8 ascertainability issues that Judge Hellerstein raised.
9 And at each point, they were rejected.

10 So again, to invoke the words of Judge Pauley,
11 at some point you have to end the madness and from
12 Lifetime's perspective, there's no end in sight
13 because Mr. Bank is going to keep coming forward,
14 heedless of the Second Circuit's clear, biding rules on
15 when a case is time barred.

16 THE COURT: But I take it there's no basis to
17 sanction on a Corwik ground, in light of the Supreme
18 Court grant's cert grant.

19 MR. FEDER: We wouldn't say there's a sanction.
20 Our argument was never that Corwik a sort of standing
21 alone is a ground for sanctions. Corwik talks about the
22 abusive options.

23 THE COURT: No, but here's the point, right?
24 Like if I am talking about Rule 11, I have to identify
25 one, a pleading and two, a claim that has -- that is

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1 patently frivolous, right? And for something to be
2 patently frivolous, I have to identify some authority
3 that would make it such, right? If there were a statute
4 that said you can't permit TCPA class action, that would
5 be clearly enough.

6 And so I have to find -- if one is to impose
7 sanctions here, one has to base it on a claim and on it
8 being patently frivolous.

9 MR. FEDER: Absolutely, your Honor, and in all
10 candor, I don't think we would be moving for sanctions if
11 Corwik were the only issue because the fact is, Corwik is
12 a little bit of a squishier doctrine because you would
13 have to look at was it denied for reasons of, you know,
14 deficiencies in the class or was it the lead plaintiff
15 and there's cases distinguishing Corwik.

16 So we're not moving -- with this complaint is
17 not frivolous because of Corwik. This complaint is
18 frivolous because of Giovanniello for the reasons that
19 you alluded to in your discussion with Mr. Bank, that
20 there is just no grounds here to get around the clear
21 binding law of the Second Circuit.

22 And the important thing to keep in mind with
23 objective reasonableness. So Mr. Bank may believe in his
24 heart of hearts that he should have won Giovanniello or
25 that some day courts will get wiser and decide to go a

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1 different route but Rule 11 doesn't look at what your
2 sort of hopes and dreams are.

3 It looks at what is objectively reasonable and
4 the reality is that no only was Giovaniello decided and
5 binding, it was well-reasoned and it was consistent with
6 every single circuit court that has addressed the issue.

7 The circuits have only continued to reaffirm
8 the principles since then. There's no contrary authority
9 whatever. There's no valid basis to extinguish it. Sand
10 so instead what we're left with is Mr. Bank's argument
11 that he should be permitted to preserve the arguments for
12 why Giovaniello should be overturned.

13 And completely in the abstract they might have
14 some appeal, he alludes to Brown v. Board and Plessey v.
15 Ferguson, obviously impact the litigation happens all the
16 time where you bring a claim.

17 And frankly, in order to have standing to bring
18 the claim, you have to be -- or sorry. You bring the
19 claim to overturn a higher court decision. In order to
20 have standing, you have to be subject to that decision,
21 so you know you're going to lose in a lower court until
22 you get to the point where you are going to be ale to get
23 something overturned.

24 But that's not what we have here. This isn't a
25 plaintiff who found him or herself in the unfortunate

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1 position of being bound by the Giovanniello rule and
2 saying I think that's wrong. I want to bring it up with
3 the Second Circuit.

4 First of all, this is a four-year-old decision.
5 It was just decided and again, is fairly ironclad but
6 either way the Giovanniello problem here is entirely of
7 Mr. Bank's own making. He was counsel in Giovanniello.
8 He knew the rule that came down and he was counsel in
9 Leyse I.

10 So he knew exactly, one, when the claim
11 accrued, two, when he filed the complaint and three, when
12 class cert was denied, so he knew full well that there
13 were three days left.

14 So if he wants you to avoid the Giovanniello
15 issue, he could or and should have brought another claim
16 at that point.

17 Taking a step back though, this also gets to a
18 broader point, your Honor was raising which is what is
19 the point of bringing this claim except to serially
20 relitigate and get multiple bites at the apple for the
21 same questions that have already been decided.

22 I am not surprised, frankly, that he didn't
23 bring a second claim in September of 2015 because there
24 would have been very little point in doing so. But
25 there's no more point in doing so today.

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1 The class issues have been decided. If the
2 Supreme Court reverses, then we return in Leyse I and we
3 see what happens there. But otherwise, this new case is
4 superfluous at best and either way is again clearly time
5 barred.

6 And so returning to the themes of ending the
7 madness, our perspective is that Lifetime should not have
8 to keep bearing the expense of -- and frankly, the Court
9 shouldn't have to keep bearing the expense of this.

10 THE COURT: So what's the -- if one is to grant
11 sanctions, what is the relief that you're seeking?

12 MR. FEDER: Well, under 1927, Section 1927
13 which --

14 THE COURT: Assume we're only in the Rule 11
15 world for now.

16 MR. FEDER: Right. I have to look at the full
17 Rule 11 to see the range of sanctions. Obviously from
18 our perspective, we would want recovery of costs and fees
19 for defending against this.

20 THE COURT: You're only talking about -- in
21 other words, even if we're 1927, we're only talking about
22 fees and costs related to the McCabe action.

23 MR. FEDER: Absolutely. Yeah, we would not
24 contend that this Court has the authority to order
25 sanctions against Mr. Bank or McCabe or anyone related to

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1 actions taken in completely separate cases. Those cases
2 are obviously relevant to the overall consideration and
3 believe me, we would love to recover our costs for that.
4 I mean, in Leyse II, we filed the pre-motion letter with
5 Judge Pauley. We went to the conference with Judge
6 Pauley and he said end the madness.

7 At that point, we began preparing our motion to
8 dismiss and, along with the motion for sanctions which
9 Judge Pauley encouraged, expressly and then in the
10 interim, the Second Circuit denied Mr. Bank's petition
11 for en banc rehearing of the Leyse I decision and then
12 another couple of weeks later, he voluntarily withdrew
13 the complaint in Leyse II, after we had already expended
14 costs. That's sunk. We realize that.

15 But the upshot is that this whole process
16 continues to --

17 THE COURT: But --

18 MR. FEDER: -- incur -- causes Lifetime to
19 incur costs that it really shouldn't be having to incur.

20 THE COURT: Okay. And why isn't it the case
21 that Mr. Bank, advocating for his client, can pick up
22 Giovanniello and say look, I understand this is a rule
23 decision but I have to look at it and see in which
24 situations it might apply.

25 And what I have here is a case involving a New

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1 York statutory bar and I'm not going to extend tolling
2 when you've had a denial for class certification for New
3 York statutory bar.

4 Why is that not at least a non-frivolous
5 argument that there might be tolling available in a
6 situation where the certification is denied or the class
7 is not certified for unascertainability grounds, for
8 example?

9 MR. FEDER: Well again, we would return to the
10 idea of objective reasonableness here. You know, that
11 Mr. Bank may believe that, may have that theory but it
12 has to be objectively reasonable and for many of the
13 reasons your Honor alluded to during the discussion,
14 there's no case that's drawn that distinction. There's
15 no remotely limiting language in Giovanniello. There's
16 nothing that would objectively and reasonably give a
17 lawyer grounds to think that Giovanniello would not apply
18 to bar this case.

19 THE COURT: Thank you. Mr. Bank?

20 MR. BANK: That's not the issue. As I stated
21 before and again for what it's worth, we could not have
22 been more straightforward in our briefs. We specifically
23 stated in the briefs and we reiterated here that although
24 we think that the factual differences between
25 Giovanniello and the present facts here, although we said

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1 we thought those differences were material, we've said
2 all along, we've been as candid as any lawyer has
3 probably ever been, said there was no specific reason to
4 believe that Giovanniello would have come out differently
5 had the facts of this case been before the Court in
6 Giovanniello.

7 We didn't lie. We didn't mislead. We didn't
8 -- far from attempted to be misleading or anything of the
9 sort, we did the complete, complete opposite. Now,
10 having said --

11 THE COURT: So I take your point that if the
12 same facts weren't present in Giovanniello, the decision
13 would in your view, in your candor, would have come out
14 the same way.

15 MR. BANK: Well, what we've said and I've said
16 it again here, we have no specific reason to believe
17 otherwise, that -- again, whether that means we had that
18 discussion earlier, whether that prediction, let's say on
19 McCabe's part or on my part as counsel, is correct or
20 not, that is a separate issue as to again being legally
21 technical if you will, whether Giovanniello is binding.

22 We think the facts that related to the issue of
23 law in Giovanniello are materially different. That
24 they're not irrelevant or don't constitute irrelevant,
25 factual distinctions but let's say for the sake of the

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1 discussion that the Court disagrees and believes that
2 either based on -- I mean we quoted the case law as to
3 that standard about there being materially different
4 facts in the cases or irrelevant distinctions, but for
5 whatever reason, and I don't think it matters, let's
6 suppose the Court finds that Giovanniello is binding.
7 Let's even suppose that Giovanniello was exactly on point
8 factually speaking, 100 percent, no argument, with this
9 case. So it's just a Rule 23 denial, identical. It
10 wasn't.

11 But let's just suppose it even was, so that I
12 could not in good faith or what have you, even try to
13 convince the Court that Giovanniello is not technically
14 binding. Let's say I was not in a position to do that,
15 okay? So I am sort of giving the defendant the best case
16 scenario from their point of view, okay? I'm putting
17 myself in the weakest position, that I brought a case
18 knowing that it was 100 percent or virtually 100 percent
19 guaranteed to be doomed at least the district court level
20 because of a binding precedent that's undisputedly on
21 point in all respects.

22 Let's suppose that's the case, okay? That's
23 the defendant's position but let's suppose that's
24 actually the case.

25 Does that mean that bringing this action with

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1 that precedent hovering over it and dooming the case and
2 the district court is sanctionable and the answer clearly
3 under the case law and I would dare say even under common
4 sense, is absolutely not.

5 First of all as discussed at length in the
6 briefs and I don't think the defendants dispute it, cases
7 get overruled routinely. Happens all the time at all
8 different levels. That's why lawyers or parties are
9 allowed to assert a claim, even if that claim is, as in
10 at least my hypothetical that I just laid out here, even
11 if that claim is absolutely doomed at the trial court
12 level, a party can bring an action knowing that there's
13 binding precedent against it --

14 THE COURT: Well, let's be clear. Rule 11
15 talks about your claim either must be warranted by
16 existing law, which your hypothetical wouldn't exist.
17 Right?

18 MR. BANK: Right.

19 THE COURT: It would not be warranted by
20 existing law.

21 MR. BANK: That's correct, your Honor.

22 THE COURT: Or by a non-frivolous argument for
23 extending, modifying or reversing existing law.

24 MR. BANK: That's what I want to get to.

25 THE COURT: Okay? And where in your briefs do

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1 you make a non-frivolous argument for reversing existing
2 law?

3 MR. BANK: I assume, your Honor, just so
4 there's no confusion, I assume that your Honor is not
5 referring to having this court reverse anything, correct?
6 I just want to make sure that's clear. Because I am
7 talking about preserving our rights for appeal.

8 THE COURT: Well, no, no, no, the whole issue
9 in Rule 11 is that you file a pleading in a court and the
10 pleading, the claim, has to fall within one of these two
11 buckets; either it's warranted by existing law or there
12 is some basis for extending, modifying or reversing
13 existing law in that pleading.

14 MR. BANK: Yes, I am just trying to be --

15 THE COURT: And it has to be before us.

16 MR. BANK: Well, no, no, several -- maybe I am
17 confused. In terms of preserving one's rights for future
18 appeals, that is in this case it would be an appeal from
19 this case, I don't mean in a separate case but in this
20 case, one doesn't -- one can bring a claim that he
21 knows --

22 THE COURT: But you still have to have an
23 argument --

24 MR. BANK: Yes.

25 THE COURT: -- that is non-frivolous --

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1 MR. BANK: Yes, yes, okay.

2 THE COURT: -- for why the case should be
3 reversed.

4 MR. BANK: Okay. In terms of, just so I am
5 following you, that's all -- I am just being a little
6 technical here but in other words, in this case, just for
7 example is your Honor asking me why, for example, I have
8 some good argument as to why the Second Circuit and/or
9 the Supreme Court should reverse or revise or modify
10 Giovanniello?

11 THE COURT: Right.

12 MR. BANK: Okay.

13 THE COURT: I'm just reading you the text of
14 Rule 11.

15 MR. BANK: Yes. And in other words, I am just
16 making sure I understand because again in my
17 hypothetical, obviously I cannot ask this Court to
18 reverse what in my hypothetical is a binding decision.
19 There's no argument about that.

20 THE COURT: Right. But you still have to have
21 -- when you file the pleading, you have to have some
22 basis for saying look, and that you have to articulate a
23 response for Rule 11 motion --

24 MR. BANK: Yes.

25 THE COURT: -- that's a non-frivolous argument

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1 why Giovanniello was wrong. It should be reversed.

2 MR. BANK: By a higher court, not by this
3 Court, correct?

4 THE COURT: It doesn't matter.

5 MR. BANK: Okay. I just want to make sure I
6 understand because I don't want the Court to think --

7 THE COURT: It doesn't matter. It certainly
8 has to be by this Court or another, that's irrelevant.

9 MR. BANK: Okay. By some court in this
10 litigation, correct?

11 THE COURT: Listen, you're trying to bind me to
12 Rule 11. I'm just telling you what it says.

13 MR. BANK: Right. Okay. I just want to make
14 sure we're on the same page, that's all. Okay.

15 THE COURT: You know, I am asking you, what's
16 the non-frivolous argument for reversing Giovanniello?

17 MR. BANK: Those arguments are and we discuss
18 them throughout the briefs and I discussed it at the
19 outset, that the rationales of American Type polling --
20 polling -- American Pipe tolling, continue to apply
21 during the appellate process. Other courts have held
22 exactly that.

23 That a court in different context, some of the
24 exact same context here --

25 THE COURT: No, no, no what court has said, and

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1 I think I've asked you this multiple times, that American
2 Pipe tolling extends past a denial of class cert?

3 MR. BANK: Sure, there's the case we cite in
4 the briefs and a few cases, the West Haven case which was
5 a 1988 case, District of Connecticut, that was a partial
6 denial of certification but with respect to that partial
7 denial, that's what it held. There's a Davis case, which
8 was a Maryland case which was upheld on appeal in 1985.
9 There was a Supreme Court of Utah case which formally
10 adopted American Pipe tolling following federal case law
11 in that situation. And that was a State Supreme Court
12 case that observed and I quote or paraphrased, "Whether
13 American Pipe tolling lasts only until the trial court
14 denies certification or continues through the appeal, was
15 left unclear by American Pipe and Crown Cork."

16 And then it said, American Tiara (ph.)
17 followed, "Several lower courts that have uniformly
18 concluded that the rationale for American Pipe tolling
19 continues until class certification is finally determined
20 on appeal."

21 Giovanniello is a relatively recent case.
22 Whether we can cite a case that specifically says
23 Giovanniello is wrong or disagreeable, I think is neither
24 here nor there. It's the legal issues. Is it
25 inconceivable --

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1 THE COURT: Eight other circuits reached the
2 same decision as Giovanniello. Is there a federal
3 circuit that comes out the other way?

4 MR. BANK: I will address it in a moment.

5 First, Judge, we think it's three circuits that actually
6 reached holdings. Other circuits, as happens all the
7 time in law, made certain assumptions about that, only
8 because it --

9 THE COURT: That may be but that --

10 MR. BANK: -- wasn't the issue.

11 THE COURT: -- the Second Circuit said eight
12 circuits have held this way and we follow them. So it
13 may be, you know -- you're arguing uphill but the Second
14 Circuit --

15 MR. BANK: Well, that might well be.

16 THE COURT: -- said eight circuits ruled this
17 way and that's what we have to accept.

18 MR. BANK: Okay. Let's suppose -- I don't know
19 that the Second Circuit worded it exactly that way but
20 let's, I don't know -- in terms of actual holdings versus
21 dicta, all right, but let's just say for the sake of
22 argument that eight circuits did hold that way. I don't
23 think that's really accurate but let's just say it is,
24 okay, for arguments sake.

25 Does that mean necessarily, does that mean that

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1 the arguments which your Honor described, your Honor said
2 earlier and I wrote it down, and I hope I am quoting
3 accurately, in terms of what we're discussing right now,
4 you said that well, maybe before -- maybe some time ago
5 or before Giovaniello, McCabe would have had good
6 arguments.

7 So it's a mere fact that a certain number of
8 courts rule a certain way change the intellectual basis
9 of the argument?

10 THE COURT: No.

11 MR. BANK: No.

12 THE COURT: But if it gets litigated and
13 decided one way, you can't then say well, then look,
14 unless you have a non-frivolous basis for modifying or
15 extending or reversing that precedent, you know, simply
16 filing pleadings that are inconsistent.

17 MR. BANK: Judge, we discussed a bit today and
18 more in the briefs about whether the underlying
19 rationales of the tolling -- of American Pipe tolling?

20 THE COURT: But if those were already presented
21 -- those were presented in Giovaniello, am I wrong about
22 that?

23 MR. BANK: I believe that they were. Yeah, I
24 assume they were but again, does the fact that that court
25 or any other courts reject a certain proposition, does

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1 that mean that the proposition is frivolous as a matter
2 of substance? The answer is no, and I will refer to a
3 case that that stood out from law school, which I am glad
4 I remembered; Central Bank of Denver. We discussed it in
5 the briefs. I don't remember what -- it was something
6 with a bank in issue. I don't think the legal issue
7 itself is relevant. Eleven circuits had addressed
8 whatever the legal issue was at issue in Central Bank of
9 Denver. All eleven ruled the same way, all eleven out of
10 eleven and that's more than the three I think are at
11 issue here or more than the eight that defense
12 characterized it as, eleven out of eleven. And the
13 Supreme Court reversed, reversed in that case and
14 overruled all other ten courts of appeals.

15 The question in answering whether an argument
16 is frivolous, I don't think can be based on some sort of
17 statistical analysis. How many courts have addressed the
18 issue of what did they say? It's on the nature of the
19 arguments.

20 So if I said, and you'll pardon me if I use
21 this sort of an extreme example, if someone -- if I sued
22 the planet Jupiter, I don't think it would matter -- and
23 I'm not trying to be silly, I'm just really trying to
24 make a point -- I don't think it would be relevant
25 whether the defendant can come up with cases, say that

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1 you can't have standing for a case against Jupiter. It
2 would not be relevant at all. It would be what is the
3 substance of the argument?

4 Again, should counsel and/or the parties in
5 Central Bank, should they have been sanctioned too?

6 THE COURT: But under that standard, any
7 argument satisfies Rule 11.

8 MR. BANK: No, not --

9 THE COURT: Why?

10 MR. BANK: I just gave an example of one that
11 would not.

12 THE COURT: Why?

13 MR. BANK: Because there's no, unless I can
14 come up with it -- assume that I can come up with no
15 intellectually reasonable, doesn't mean you would have to
16 agree with it, reasonable basis to say I can sue the
17 planet Jupiter, then that too, that would seem to be
18 sanctionable. It doesn't matter that they can't cite a
19 Ninth Circuit or a Second Circuit case on point. I
20 assume they wouldn't be able to because --

21 THE COURT: But that assumes a situation where
22 those issues have not been decided. The difficulty I am
23 having here is --

24 MR. BANK: Well, that's the Central Bank
25 situation.

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1 THE COURT: Well --

2 MR. BANK: The issue had been decided by eleven
3 circuits.

4 THE COURT: And what's not clear there is in
5 what posture was the party bringing the claim? Were they
6 in a circuit --

7 MR. BANK: I --

8 THE COURT: -- in which they hadn't been
9 decided? Were they the --

10 MR. BANK: I --

11 THE COURT: Rightfully, you know, no one is
12 suggesting it's a statistical analysis but you litigated
13 Giovanniello. This issue was brought. You're trying to
14 relitigate it again here.

15 MR. BANK: But again, your Honor, if the issue
16 is -- if it's not -- if the arguments themselves, the
17 intellectual, if you want to call it, arguments
18 themselves, and let me just --

19 THE COURT: Well, I guess your point is --

20 MR. BANK: I don't -- it's --

21 THE COURT: -- is that if Giovanniello didn't
22 say these are frivolous arguments --

23 MR. BANK: No.

24 THE COURT: -- right, it --

25 MR. BANK: And neither has any court that I am

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1 aware of.

2 THE COURT: And unless someone -- if a court
3 were to deem a set of arguments frivolous, put aside the
4 Jupiter extreme examples --

5 MR. BANK: Okay.

6 THE COURT: -- then you can't raise those
7 arguments in a district court again --

8 MR. BANK: If there's a binding opinion, if
9 there's --

10 THE COURT: -- saying that they're frivolous.

11 MR. BANK: I would -- well, it's somewhat of a
12 gray area. Again, that didn't happen here. I just think
13 -- just answering your question, I think that's somewhat
14 of a gray area because what if the case --

15 THE COURT: But I --

16 MR. BANK: -- ended up back in Supreme Court
17 and they said something else?

18 THE COURT: You know, here --

19 MR. BANK: But again that didn't happen here.

20 THE COURT: -- is the issue, right? Rule 11
21 clearly talks about non-frivolous arguments for
22 extending, modifying, or reversing existing law and I am
23 just trying to understand what the boundaries are.

24 MR. BANK: Yeah.

25 THE COURT: And --

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1 MR. BANK: It's not -- Judge, it cannot --
2 again, so are you saying, your Honor, that let's suppose
3 -- and really, I have no idea what the answer is, but
4 let's suppose that in the Central Bank case, let's
5 suppose that case had been initiated in one of the
6 circuits, one of the eleven circuits that had already
7 ruled on whatever the issue was, should that lawyer
8 and/or a party be sanctioned all the way through until
9 they finally win at the Supreme Court? The answer seems
10 to be obviously no.

11 Well, what about cases in which the Supreme
12 Court which I think is even more than the equivalent of
13 all of the circuits, what about -- and it's happened many
14 times, what about in situations in which the Supreme
15 Court itself, overrules itself, whether it be a recent
16 opinion as in the Texas sodomy case was only an eighteen-
17 year-old opinion --

18 THE COURT: Lawrence v. Texas, yes, yes.

19 MR. BANK: Okay. Now should those lawyers or
20 parties who brought that case in the face of Supreme
21 Court -- should they have been sanctioned all the way
22 through and then finally, only when they win at the
23 Supreme Court, by I think it was five to four, or six to
24 three, have the sanctions reversed or should it be based
25 on the nature of the arguments?

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1 THE COURT: Well, the argument --

2 MR. BANK: How does the law change if it
3 becomes --

4 THE COURT: Well --

5 MR. BANK: -- everyone follows everyone else
6 and then okay, this is now ossified, it can never -- what
7 if all eleven -- what if all --

8 THE COURT: But that's not what -- Rule 11
9 doesn't contemplate that, right?

10 MR. BANK: Sure it does.

11 THE COURT: I'm just trying to figure out what
12 the --

13 MR. BANK: Contemplate what?

14 THE COURT: It doesn't contemplate that there
15 can -- simply because you can -- an argument can be
16 reversed at any point in time, and the Supreme Court can
17 come out the other way, that for any such argument, it is
18 always nonsanctionable.

19 MR. BANK: Well, and I am not --

20 THE COURT: That's what your rule suggests.

21 MR. BANK: Not -- a little bit different. I am
22 suggesting that, obviously the Supreme Court can do
23 anything, okay? Let's just say. I am talking about the
24 substantive nature of the arguments. I'm not making a
25 statistical prediction on what, if anything, the Supreme

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1 Court would do in this case.

2 THE COURT: Well, I have to evaluate whether or
3 any court has to evaluate whether or not the argument is
4 a substantively argument, even if the Second Circuit --

5 MR. BANK: Correct.

6 THE COURT: -- or the controlling circuit has
7 come out the way --

8 MR. BANK: Yes.

9 THE COURT: -- whether it's a --

10 MR. BANK: Yes, otherwise it all becomes
11 ossified.

12 THE COURT: -- substantively, reasonable
13 argument.

14 MR. BANK: Well, yes, exactly. Again, if you
15 want to -- and I do have a bit more to say, so I hope I
16 will be able to address it all, if we were in a law
17 school classroom and you're the professor and said to the
18 class --

19 THE COURT: That would be sad class but you can
20 go ahead.

21 MR. BANK: Well, that might depend on, you
22 know, the details. And you were to say to the class that
23 here's the case law -- let's just even say it's this case
24 -- here's the case law and it's not three circuits, not
25 eight, let's just say even all of them have said this,

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1 even the Supreme Court maybe. And a student gets up and
2 says well, here's why I think those decision are wrong.
3 I think American Pipe tolling should continue whatever
4 the reasons we laid out are.

5 He might say that -- I don't know that -- if
6 you said oh, that student made a good intellectually
7 valid point, such that maybe if none of these cases
8 existed and I weren't bound and I were the judge, I would
9 rule in that person's favor -- not would rule but might
10 rule, would consider it. By definition, that's not
11 frivolous.

12 If it is, if the Court were to hold that
13 because eight circuits rejected my argument, not having
14 said are frivolous but because eight -- it's not eight, I
15 think it's three but let's say three, eight, whatever
16 umber, including the Second Circuit has rejected the
17 argument and therefore the argument is frivolous, then
18 everything becomes -- the law becomes ossified, nothing
19 can ever really be challenged. I don't know if the
20 defendant would say that because I was a lawyer in the
21 other two cases, I as a lawyer am precluded. I don't
22 think that they would say that but maybe they would.

23 So it's a qualitative issue. It's not
24 quantitative. It doesn't matter how many circuits. If
25 tomorrow the Twelfth -- not Twelfth Circuit, if tomorrow

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1 the First Circuit piles on, does that make my issue any
2 less or more warranted?

3 THE COURT: I --

4 MR. BANK: And what happens if tomorrow the
5 First Circuit -- let's just say by --

6 THE COURT: I am just trying to understand --

7 MR. BANK: Let's take, for example, the Corwik
8 situation --

9 THE COURT: -- from you --

10 MR. BANK: Yeah.

11 THE COURT: And no one has suggested a
12 quantitative test, I am just trying to understand what
13 the term non-frivolous means --

14 MR. BANK: Yes.

15 THE COURT: -- and which I think I understand
16 your position.

17 MR. BANK: If you were to conclude that as an
18 intellectual matter, that my argument -- that our
19 arguments are ridiculous, okay, that the idea that
20 American Pipe tolling ought to continue -- keep in mind
21 American Pipe tolling, it's not a matter of statutory
22 interpretation, it's a public policy issue, that's how
23 the courts look at it. It's not based on an
24 interpretation.

25 So if your Honor were to say -- if your Honor

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1 were to have the view point that the notion that American
2 Pipe tolling should continue as courts have said -- many
3 courts have said this, not in the Second Circuit or not
4 in Giovanniello, many courts have said this, that tolling
5 does continue until there is an appeal because otherwise,
6 it's exactly the problem that gave rise to tolling in the
7 first place.

8 How would it help the judicial system -- let's
9 say in this situation after, as defendants seem to wish,
10 they seem to wish that McCabe, if you were going to sue,
11 did so right after Judge Hellerstein's class
12 certification denial, so let's suppose he and other like-
13 minded class members, bring those cases as protected
14 measures.

15 Now they don't know what's going to happen on
16 appeal, so let's suppose it turned out that the class
17 certification denial were reversed on appeal, how does
18 the pendency of all those claims which the defendant knew
19 about from day one from the class -- by virtue of the
20 initial Leyse class action, how would the pendency of all
21 of those claims be beneficial to anybody?

22 Do you really think the defendant -- obviously,
23 the defendant didn't want to be sued by anybody. I
24 understand. Do you really think that the defendant's
25 preference was that gee, we would really rather be sued

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1 by McCabe on September 23rd, 2015 than whatever it is
2 that he brought this case after the Second Circuit's
3 ruling? The hope, the theoretical, at least, hope, was
4 that McCabe wouldn't have to bring his own action because
5 the appeal would be favorable to him. It wasn't but
6 to --

7 And I am almost -- I don't mean to be dramatic
8 and say I am offended by the concept but I am. The
9 concept that I can bring a -- and this Court, your Honor
10 yourself said unless I am misquoting your --
11 mischaracterizing, you said that my arguments had -- that
12 they might have been good arguments before Giovaniello
13 but to me that means they might have been winning
14 arguments before Giovaniello. I have conceded for the
15 sake of discussion only, that at least before this Court,
16 I have conceded for the sake of my hypothetical before
17 that Giovaniello was binding and therefore, we cannot
18 win in this Court if that's the case, which I don't doubt
19 that your Honor seems to see it very much that way and I
20 understand that and that's fine.

21 THE COURT: This is argument.

22 MR. BANK: I am not --

23 THE COURT: I don't see anything one way or the
24 other.

25 MR. BANK: Okay.

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1 THE COURT: But go ahead.

2 MR. BANK: Well, I thought you saw it that way.
3 I understand. Okay? The --

4 THE COURT: One has to write an opinion before
5 one can give a decision.

6 MR. BANK: Okay. Fair enough. Maybe I am
7 making a prediction. But when numerous courts have held
8 in different context, partial class certification
9 denials, class certification decisions that were then
10 decertified or followed by a dismissal and cases that we
11 discussed through -- I mean, I can repeat them all but
12 they're all throughout the very lengthy memorandum in
13 opposition to their sanctions and dismiss the motion.

14 THE COURT: I will say on that point, it
15 doesn't appear that -- and I can't say you violated any
16 rule but why you filed 65, 70-page briefs in this case?

17 MR. BANK: Why did I?

18 THE COURT: Yeah.

19 MR. BANK: The issues that were -- I am not
20 sure what you're --

21 THE COURT: My point is --

22 MR. BANK: I don't think I -- I have given --
23 well, again the defendant -- well, I wanted to address
24 all of the issues and this is one of the problems I've
25 seen in this case and others throughout my career, and

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1 this happens all the time and why -- not always, not
2 always, but many times, my briefs are much longer than a
3 defendant's brief and this is exactly why, your Honor,
4 and I'm telling you exactly how it's been.

5 The defendant describes the case in a sentence
6 or two and maybe a paragraph, and I then feel the need
7 to, if they're right, then so be it --

8 THE COURT: Fair enough.

9 MR. BANK: That's why I describe cases --

10 THE COURT: You can keep --

11 MR. BANK: -- I probably spend 20 or some-odd
12 pages describing the case law that clearly supported
13 either by being exactly on point or similar, supported
14 McCabe's position. So it's the defendant -- and the need
15 to disparage me and/or McCabe, says the plaintiff
16 exhaustively --

17 THE COURT: What -- okay.

18 MR. BANK: -- discussed these cases.

19 THE COURT: Why don't we --

20 MR. BANK: Thoroughly discussed the cases.

21 THE COURT: Do you have any other point to make
22 on the Rule 11 motion?

23 MR. BANK: Yes. so just to reiterate, I said
24 earlier I guess at the outset of this discussion, that
25 when a claim is as I've laid out in at least the

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1 hypothetical, known to be doomed or likely to be doomed,
2 in this case regarding Giovanniello, counsel or parties
3 can assert those same claims in order to preserve their
4 rights for an appeal.

5 Lifetime, other than citing cases that oppose,
6 there were cases on both sides of course, that oppose
7 McCabe's position, Lifetime has never even argued or
8 suggested that the position in substance was frivolous.
9 All they've done is say look at all these courts -- look
10 at all these courts that have said X, and therefore, when
11 Mr. Bank comes along and Mr. McCabe comes along and says
12 Y, oh, that's frivolous.

13 They've never said here's why it would be off
14 the wall or ridiculous or what have you for American Pipe
15 towing to continue as McCabe has argued. They have never
16 said that and the truth, I believe, is because there is
17 no argument for that. There is an argument to say it
18 shouldn't continue. That's the public policy, we can
19 dispute that but the notion that it would be better to
20 have all of these protective actions filed after
21 certification but before an appeal, the notion that
22 that's frivolous is itself frivolous and numerous courts
23 have rejected that. Some have accepted it. That's fine.

24 But no court has said that our position is
25 frivolous. It's far from frivolous. And if the issue

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1 ever did get to the Supreme Court, I wouldn't be
2 surprised if it went the other way, just like in Corwik.
3 It might, six, seven, who knows -- I don't know how many
4 circuits held the same thing as Corwik about an
5 inherently uncertifiable class cannot benefit from
6 American Pipe tolling in a subsequent class action.
7 Well, now that's before the Supreme Court. I don't know
8 what it will do.

9 But my point being that all the defendant's
10 arguments have been based on have been is we don't like
11 Mr. Bank, Judge Pauley said when are we going to end the
12 madness. That was in a very different context. It was
13 because Leyse already had a judgment at the time that --
14 as Judge Pauley saw it, and I think he made a good point,
15 which Lifetime hadn't actually made itself but Judge
16 Pauley did during the conference, which is that because
17 we had Leyse unlike in this case, had a judgment in its
18 favor, as of the time he commenced the briefly existing
19 Leyse II action, that case in controversy requirement of
20 the Constitution could not be met. And we soon after,
21 withdrew that case.

22 Obviously the defendant could have moved for
23 sanctions in that case but for whatever reason decided
24 not to. Essentially, they are asking this Court to
25 sanction me -- sanction me because of Leyse II. They say

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1 it's all about the context. It's not -- that's not what
2 they're saying. Their papers are very clear that they've
3 repeated the madness quote throughout their papers, and
4 they're trying to get this Court, just being frank, to
5 hold it against me that I brought Leyse II.

6 But regardless, Judge Pauley commented only on
7 the issue of the judgment. We did withdraw that case,
8 not long after that. Judge Pauley never even gave a hint
9 as to his viewpoint on any of the issues that are before
10 this Court, not a clue. And I, unlike the defendant, we
11 provided the entire transcript so that again --

12 THE COURT: Well, look --

13 MR. BANK: -- in the interest of being candid.

14 THE COURT: I don't think there's a basis to
15 sanction for bringing Leyse II.

16 MR. BANK: Okay. So then I will move on from
17 that.

18 THE COURT: You can move on.

19 MR. BANK: Okay. I appreciate that.

20 THE COURT: I don't think this Court has the
21 ability to sanction --

22 MR. BANK: And I appreciate that.

23 THE COURT: -- on conduct --

24 MR. BANK: Let's move on.

25 THE COURT: -- in another court.

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1 MR. BANK: Right. And again to move on, if
2 this Court -- if in any case, the Court were to find as a
3 matter of statutory interpretation, an argument were off
4 the wall, or ridiculous, sanctionable, this is a public
5 policy issue but it's the same thing, if -- I'll ask only
6 rhetorically, of course, but rhetorically, does this
7 Court think that the concept, the intellectual basis for
8 arguing that American Pipe tolling ought to continue as a
9 matter of public policy until or at least until an
10 appeals court addresses rules on a class certification
11 denial is such a ridiculous position that any counsel who
12 brings that position should be sanctioned? Again, I said
13 I'm asking rhetorically.

14 But the answer, as I see it, would have to be
15 yes, that that position as an intellectual matter, as a
16 substantive matter, be so ridiculous --

17 THE COURT: And you would agree, would be an
18 objective standard.

19 MR. BANK: I'm sorry?

20 THE COURT: It would have to be an objective
21 standard.

22 MR. BANK: Yeah, objectively ridiculous. That
23 no half-brained attorney, if you want to put it that way,
24 would even think to make -- no law student would make
25 that argument, or no educated law student, what have you.

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1 And again, the defendant has never even
2 suggested that answer is yes. All they said Mr. Bank is
3 a troublemaker. He represented in Giovanniello. He
4 represented Leyse, and Leyse II and McCabe. And all
5 these courts have said X and Giovanniello was one of them
6 and therefore, he should be sanctioned.

7 They've never said the argument itself is
8 frivolous. They've never said for example, as I think
9 they would have to show or convince the Court of, that if
10 this case were to get to the Supreme Court, there is no
11 way, no possibility that the Supreme Court would rule in
12 McCabe's favor. They can't show it. They can't -- I
13 don't think they can convince the Court of that at all.
14 And I don't see how. But I think that's what they would
15 have to show to get sanctions. It's a qualitative issue.

16 Now let's look -- the Second Circuit in the
17 Eastway Construction case, a 1985 case, it's in the
18 briefs, said that "Sanctions are warranted only where (a)
19 there is no chance of success under the existing
20 precedence and" -- and the key here is and because again,
21 I am assuming for sake of discussion that we are bound by
22 Giovanniello, okay, in this Court.

23 "And no reasonable argument can be made to
24 extend, modify, or reverse" -- and I am quoting your
25 Honor actually -- "reverse law as it stands." Well,

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1 let's say as it stands, Giovanniello has said that ths
2 claim is precluded based on American Pipe tolling or the
3 limited period to which it applies. We have no -- McCabe
4 has no valid argument for coming back to the Second
5 Circuit or en banc and/or the Supreme Court which a lot
6 of these cases deal with to say that hey, we think
7 American Pipe tolling ought to continue through the
8 appellate process.

9 I mean, I really mean this without trying to be
10 blustering or anything, it is offensive to me, the idea
11 to me that I ought to be sanctioned, for making an
12 argument that has never even been suggested was
13 frivolous, is offense to me. The idea that because I am
14 in a -- at least at the moment maybe, in a theoretical
15 minority of people taking my position --

16 THE COURT: And Mr. Bank, I want to give you as
17 much opportunity as you need --

18 MR. BANK: Okay, so I will move on.

19 THE COURT: -- but you've said that four or
20 five or six times now.

21 MR. BANK: Okay. Then I will move on. I will
22 move on. I know. I can do that, your Honor.

23 THE COURT: And --

24 MR. BANK: Like I can do that. In the Gilmore
25 case, again, Second Circuit 1987, in that case, the Court

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1 rejected on the basis of binding precedent, a challenge
2 to a Supreme Court decision that the Second Circuit had
3 affirmed or I should say followed, only the year before,
4 okay, Giovanniello, well I will say for our purposes is
5 just as recent, even though it's a few years older, okay?
6 So this is a recent decision of the Second Circuit and
7 someone challenges, someone raised the argument and did
8 the Court sanction him? No, in response to the motion
9 for sanctions, the Court sanction him?

10 No, in response to the motion for sanctions,
11 the Court said the appellee, who raised the argument,
12 "The appellee has prudently preserved his position which
13 would enable him to seek Supreme Court view on this
14 issue. Although we find that we," as I think this Court
15 might find -- might find -- "that we are constrained to
16 follow the challenged rules. The appellees attack on the
17 rule is far from frivolous."

18 So there was Second Circuit opinion following
19 the Supreme Court which is maybe even stronger, following
20 the Supreme Court, a party, a lawyer came along and said
21 we don't think that's right. We would like to get this
22 issue back to the Supreme Court. I don't know whatever
23 happened s far as that went. Sanctions were requested
24 and denied because the Court said lawyers are allowed to
25 preserve the issue of argument.

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1 McKnight, was a Supreme Court case --

2 THE COURT: And, Mr. Bank?

3 MR. BANK: Yes.

4 THE COURT: I'm scrolling, I am reading your
5 brief --

6 MR. BANK: Okay.

7 THE COURT: -- as you're reading, I can predict
8 the words coming out --

9 MR. BANK: Okay, that's fine.

10 THE COURT: -- of your mouth, so you don't need
11 to repeat them for me.

12 MR. BANK: And then may I address the sanctions
13 -- our sanctions motions?

14 THE COURT: Yes.

15 MR. BANK: Okay. The reason, as we argue
16 extensively in our briefs and this has been -- I know the
17 defendants give context as they decide, so I will do the
18 same for a moment -- throughout all this litigation, and
19 I can recount them off the top of my head, I have had to
20 deal with numerous, blatant falsehoods by the defendant
21 in this case, which probably one of the reasons my brief
22 of 55 pages was so long, okay?

23 Lifetime contends, just for example, this is
24 part of its modus operandi, ever since, Leyse I, and
25 continuing until the present day, that Lifetime -- and

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1 I'll get into the specifics just in a moment, Lifetime
2 makes charge after charge after attack after attack for
3 the obvious purpose of trying to bias the Court against
4 me and/or my client, okay, which is bad enough but when
5 the attacks are factually baseless, that's even worse.
6 So I will just begin with one specific and go from there.

7 Minor point but it's a --

8 THE COURT: And I urge you, Mr. Bank, you know,
9 we're well over time, so if you'll just --

10 MR. BANK: I'll try to move.

11 THE COURT: -- if you're just repeating what's
12 in your brief --

13 MR. BANK: Okay. Okay. So then --

14 THE COURT: -- then you don't need to do that.

15 MR. BANK: Then we covered that -- all right,
16 then I did cover that all in the briefs. But again, I
17 think when -- I think in this case, this idea of zealous
18 advocacy, I think was significantly overstepped and
19 again, I -- I would ask at least rhetorically if there
20 was anything in these 70 or 80 or 90 pages of briefs that
21 we submitted whether there was even anything that is even
22 arguably false or misleading or less than completely
23 forthright. The defendant's papers are chock-full of
24 those kinds of remarks and incorrect descriptions of case
25 law. Blatantly false descriptions of facts.

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1 Mr. Bank has represented Mr. McCabe in numerous
2 TCPA lawsuits. One other and an objection in another
3 case. If numerous other TCPA is lawsuits, is one lawsuit
4 plus one TCPA matter where there was an objection to a
5 class settlement, then I guess I've represented Mr.
6 McCabe in many other TCPA lawsuits.

7 Mr. McCabe has represented -- Mr. Bank, excuse
8 me, has represented Mr. McCabe and Mr. Leyse in numerous
9 cases around the country, which is irrelevant but it's
10 not even true. I've had a couple of case in other cases
11 with Mr. Leyse. I don't think any with Mr. McCabe.

12 And again, all this - the defendant could have
13 stuck to just the issues but again, it just comes back to
14 the rhetorical question, who between the parties, if any,
15 who had papers that were full of false and misleading
16 representations. Was it defense counsel or was it me?
17 And I submit to the Court that it's not even -- it's as
18 black and white an issue as there could be.

19 And the defendant, other than making things up
20 which I responded to, not a single sentence that I
21 recall, at least, not a single sentence in any of the
22 80-some odd or 90-some odd pages in our briefs --

23 THE COURT: Mr. Bank, now you're repeating
24 yourself again --

25 MR. BANK: I know. I apologize.

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1 THE COURT: -- for the fifth or sixth time.

2 MR. BANK: I apologize. So I guess I will --

3 THE COURT: If you want to make any points that
4 you haven't made already, I will give you the opportunity
5 to do so but, you know, we're well over time.

6 MR. BANK: Okay.

7 THE COURT: And --

8 MR. BANK: May I reserve? I don't know what
9 they will --

10 THE COURT: We're kind of done here.

11 MR. BANK: Okay.

12 THE COURT: Unless there's anything you would
13 like to add at the end here.

14 MR. BANK: Okay. Oh, I am sorry. I am sorry.

15 MR. FEDER: No, I don't think -- I think your
16 Honor covered it in your discussion with Mr. Bank.

17 THE COURT: Anything else, Mr. Bank? One final
18 opportunity and if it's just repeating what --

19 MR. BANK: No, no, I will try not to --

20 THE COURT: -- it is in your brief --

21 MR. BANK: -- do that.

22 THE COURT: I assure you that I've ready your
23 briefs.

24 MR. BANK: Okay. Okay.

25 (Pause)

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1 MR. BANK: No, I think I've said everything
2 more than once, I am sure.

3 THE COURT: All right. Thank you. I
4 appreciated the argument.

5 MR. BANK: Thank you, your Honor.

6 THE COURT: And have a nice holiday.

7 MR. BANK: Thank you, likewise.

8 MR. FEDER: Thanks, your Honor.

9 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this st day of December, 2017.


Linda Ferrara

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